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ONTARIO HUMAN RIGHTS CODE

R. S.O. 1970, C.318, as amended

IN THE MATTER OF

The Complaint made by Mr. George Hope of St. Catharines, Ontario, alleging discrimination in employment by the Corporation of the City of St.Catharines and Mr. F.A. Barley, P.O. Box 3012, Church Street, St. Catharines, Ontario

AND IN THE MATTER OF

The Complaint made by Mr. George Hope of St. Catharines, Ontario, alleging discrimination in employment by St. Catharines Professional Firefighters' Association, Local 485, and Mr. Glenn Jones, 12 Lockview Crescent, St. Catharines, Ontario

AND IN THE MATTER OF

The Complaint made by Mr. Jack Karr, of St.Catharines, Ontario, alleging discrimination in employment by the Corporation of the City of St. Catharines and Mr. F.A. Barley, P.O. Box 3012, Church Street, St. Catharines, Ontario

ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1980, C. 340, as amended

IN THE MATTER OF

The Complaint made by Mr. Benjamin Whitney, of St. Catharines, Ontario, alleging discrimination in employment by the Corporation of the City of St. Catharines and Mr. F.A. Barley, P.O. Box 3012, Church Street, St. Catharines, Ontario

AND IN THE MATTER OF

The Complaint made by Mr. Karl Boatman, of Waterloo, Ontario, alleging discrimination in employment by The City of Waterloo and Waterloo Fire Department, P.O. Box 337, Marshland Centre, Waterloo, Ontario

....title page continued

THE HUMAN RIGHTS CODE, 1981
S.O. 1981, C. 53, as amended

IN THE MATTER OF

The Complaint made by Mr. Peter Callen, of La Salle, Ontario, alleging discrimination in employment by International Association of Firefighters, Local 455, and Mr. Earl Turpin-Carroll, 815 Goyeaux Street, Windsor, Ontario

AND IN THE MATTER OF

The Complaint made by Mr. Peter Callen, of La Salle, Ontario, alleging discrimination in employment by the Corporation of the City of Windsor, Kenneth G. Stewart and Larry MacDonnell, City Hall Square, P.O. Box 1607, Windsor, Ontario

A HEARING BEFORE

Dean John D. McCamus, appointed a Board of Inquiry into the above matters by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above mentioned complaints.

Appearances:

Michael Bader	For the Ontario Human Rights Commission
Weir Milne	For the Complainants, Mr. George Hope and Mr. Jack Karr
Douglas K. Gray) Michael A. Hines)	For the Corporation of the City of St. Catharines and Mr. F.A. Barley
William H. White	For the Corporation of the City of Waterloo and the Waterloo Fire Department
Barry Halliwill	For the City of Windsor and Mr. Kenneth G. Stewart and Mr. Larry MacDonnell
Jeffrey Sack) James McDonald)	St. Catharines Professional Firefighters' Association, the Windsor Professional Firefighters' Association, Mr. Earl Turpin-Carroll and Mr. Glenn Jones

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I. INTRODUCTION

The several Complaints which form the subject matter of these proceedings all relate to the issue of mandatory retirement in the context of the occupation of firefighting. The Complainants are all individuals who have been required to retire when they reached the age of sixty years, and it is their view that mandatory retirement at that age constitutes discrimination on the basis of age in a manner that is unlawful under the Ontario Human Rights Code. In this claim, they are supported by the Ontario Human Rights Commission which has essentially carried the burden of proving these claims on their behalf. Although the incidents giving rise to these Complaints range over a substantial period of time and thus are brought respectively under the 1970, 1980 and 1981 versions of the Ontario Human Rights Code, it is the position of the Complainants that there is no material difference on the question at issue here in the various versions of the Code under which the individual complaints have been initiated.

In response, the respondent employers and respondent unions have conceded that mandatory retirement at age sixty has been imposed on each of the Complainants but they argue as their defence that age sixty constitutes what is generally referred to as a "bona fide occupational qualification" for the jobs of each of the Complainants, and accordingly that the various versions of the Code have not been contravened. Again, although there is some variation in the precise statutory wording of the defence in

the several versions of the Code under which these complaints have been brought, it is the position of the Respondents that there is no material difference in the essentials of the statutory defence as as far as the present Complaints are concerned. The various Complaints, and the provisions of the versions of the Code under which they are brought, together with the statutory statements of the "bona fide occupational qualification" (bfoq) defence, will be described in the next section of this decision.

The complaints are brought, in some instances at least, against both the Complainant's employer and the Union representing him in matters of collective bargaining, inasmuch as the respondent unions have been viewed as essentially sympathetic to the reduction of the mandatory retirement age from sixty-five to sixty. Indeed, there was some evidence led to suggest that the rather widespread reduction of the retirement age for firefighters that has been implemented in the majority of fire departments across the province has resulted from pressure brought by the union movement generally and by particular local unions to effect this change. It has been alleged in the present proceedings that this change has been advocated by the unions on the basis of a concern to reduce the risk to public safety and to fellow workers that allegedly results from the continued employment of individuals who are no longer capable of effectively discharging their responsibilities as firefighters. From the Complainants' point of view, then, they see their unions as at least complicitous in a policy which they argue to be based

on a policy of age discrimination which contravenes the Ontario Human Rights Code.

The legality of mandatory retirement at age sixty for firefighters has been the subject of previous proceedings initiated by the Commission. One of these previous proceedings ultimately culminated in an appeal to the Supreme Court of Canada. In its decision in 1982 in the case of Ontario Human Rights Commission et al v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14, the Supreme Court offered guidance with respect to the burden of proof imposed on complainants in a case of this kind and, further, with respect to the factual elements that must be established by a respondent who wishes to rely upon the bfoq defence. It perhaps should be noted that the anticipated importance of this decision of the Supreme Court for proceedings of this kind apparently led the Commission to postpone its processing of complaints of this kind and this has led to considerable delay in handling some of the complaints that form the subject matter of the present proceedings.

In the Borough of Etobicoke case, the Supreme Court of Canada upheld a decision of Professor Bruce Dunlop sitting as a Board of Inquiry under the Ontario Human Rights Code, rejecting an attempt by the Borough to raise the bfoq defence. It was Professor Dunlop's view that the evidence concerning this issue led by the Borough was largely "impressionistic" and that although the evidence appeared to establish sound reasons for permitting firefighters to retire at age sixty, he felt that a

basis for mandatory retirement could not be established in the absence of some "scientific or statistical data to prove that beyond the age of sixty firefighters become less effective and less safe". Mr. Justice McIntyre, writing on behalf of a unanimous Supreme Court, adopted a similar view and offered the following guidance for Boards of Inquiry called upon to deal with issues of this kind (at pp. 22-23):

> It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of sixty-five under the provisions of s.4(6) of the Code. In the final analysis, the board of inquiry, subject always to the rights of appeal under s.14d of the Code, must be the judge of such matters. In dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative. Many factors would be involved and it would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work-place, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported. The aging process is one which has involved the attention of the medical profession and it has been the subject of substantial and continued research. Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation of employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to produce evidence on this subject.

Mr. Justice McIntyre went on to express the view that scientific evidence was not in his view an absolute requirement for the successful establishment of the defence. Clear preference for such evidence was signalled, however, in the following passage: (at p.23)

> I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this statistical and medical

> evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary will certainly be more persuasive than the testimony of persons, albeit with great experience in fire-fighting, to the effect that fire-fighting is a 'young man's game'. My review of the evidence leads me to agree with the board of inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were, in my view, properly described as "impressionistic" and were of insufficient weight.

In this decision, then, the Supreme Court has indicated that employers who wish to rely on a bfoq defence will be well advised to ground it on a basis of statistical and medical evidence related to the effect of aging on the capacity of employees to discharge the responsibilities of the occupation in question.

In the present proceedings, the Respondents have attempted to meet this requirement. Considerable evidence was led by the Respondents with respect to the particular responsibilities of the individual Complainants, the conditions under which these tasks are performed and, as well, considerable evidence with respect to the effect of aging on physical fitness, vulnerability to coronary heart disease, and on a broad range of physical and mental capacities said to be related to the successful performance of firefighting tasks. As well, evidence was led with respect to the circumstances in which mandatory retirement schemes were implemented in the various municipalities and with respect to the particular circumstances of the retirement of each of the Complainants. Although much evidence was led on each of these issues by both the Commission and the Respondents (with the result that these proceedings were unusually lengthy), it is

nonetheless the case that there was very little disagreement on the central, factual issues. The general substance of the evidence on these questions will be described in subsequent sections of this decision.

The parties are in disagreement, however, with respect to the inferences to be drawn from these essentially common facts and on the proper analysis of them under the applicable provisions of the Ontario Human Rights Code. These points of dispute will also, of course, be considered in subsequent sections of this decision.

One final preliminary point should be mentioned. It was the Commission's view that certain complaints brought by police officers in various municipalities should be joined in the current proceedings, the Minister of Labour having appointed the present Chairman to sit as a Board of Inquiry under the Code with respect to these complaints as well. In supporting a motion to this effect, Counsel for the Commission relied on s. 31(3) of the Human Rights Code, 1981, S.O. 1981 C. 53, which reads as follows:

> 31. (3) Where two or more complaints,
>
> (a) bring into question a practice of infringement engaged in by the same person; or
>
> (b) have questions of law or fact in common,
>
> the Commission may combine the complaints and deal with them in the same proceeding.

It was Commission Counsel's view that the complaints concerning firefighters and police officers shared certain questions of law and fact, and accordingly that it was appropriate to join these two sets of complaints in one proceeding. This position was opposed by Counsel for all Respondents on the basis that there was a great deal of the evidence concerning the two different sets of complaints that would not be common and further, on the basis that s. 31 appears to confer certain powers on the Commission but no powers whatsoever on Boards of Inquiry to combine complaints in a particular proceeding. That is, it was submitted that while the Commission has the capacity to deal with a number of complaints simultaneously, Boards of Inquiry do not thereby acquire a power to order joinder of complaints, especially complaints from different complainants and respondents. In the event, I found it unnecessary to rule on the question of interpretation of the Code thereby raised inasmuch as it was my view that there were not sufficient issues of fact and law in common between the two sets of complaints to render a joinder over the wishes of the Respondents appropriate in all the circumstances, even if a capacity to effect such joinder were conferred by s. 31(3) of the Code. Inasmuch as all counsel involved in the proceedings concerning the complaints relating to the firefighters were ready to proceed immediately, it was determined that the complaints concerning the police officers should be adjourned sine die, it being left to counsel involved in the latter set of proceedings to establish a mutually satisfactory date for reconvening the hearings concerning those complaints.

II. THE COMPLAINTS AND THE POSITION OF THE RESPONDENTS IN BRIEF

The bare essentials of the various complaints brought against the respondent municipalities and the respondent unions may be briefly summarized in the following manner:

A. St. Catharines

(i) Complaints of Mr. George Hope

Mr. Hope brought two complaints, one against his employer, The Corporation of the City of St. Catharines, and its Director of Personnel, Mr. F.A. Barley, and the second against his union, The St. Catharines Professional Firefighters' Association, Local 485 and its President at the material point in time, Mr. Glenn Jones.

As far as the complaint against the City is concerned, Mr. Hope simply recounted the facts of his compulsory retirement at age 60 effective February 29th, 1976. Mr. Hope alleges that he protested his retirement and advised the City that he was still capable of discharging his responsibilities. Mr. Hope had risen through the ranks, since joining the Department as a firefighter on October 16th, 1938. At the time of his retirement, he held the rank of Platoon Chief.

Mr. Hope alleges that his retirement constitutes a breach by the employer of the following provisions of the Human Rights Code then in force:

> 4(1) No person shall,
> ...
>
> (b) Dismiss or refuse to employ or to continue to employee any person;
> ...
>
> (e) Establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;
> ...
>
> (g) Discriminate against any employee with regard to any term or condition of employment,
>
> because of ... age, ... of such person or employee.

"Age" is defined in section 26(a) of this version of the Code as "any age of forty years or more and less than sixty-five years." Mandatory retirement at age 65, then, would be perfectly acceptable under the Code.

As far as the Union is concerned, two different acts of discrimination are alleged. First, when Mr. Hope was advised that he was due to retire on February 29th, 1976, he wrote a letter to Mr. Glenn Jones, the President of the respondent Association, advising him that he believed it was discriminatory for the City to force him to retire before the age of 65 and he requested the Union's support in grieving this action of the employer. The Union refused to undertake such a grievance and Mr. Jones so notified Mr. Hope on March 12th, 1976.

It is alleged that this refusal to grieve Mr. Hope's retirement is a discriminatory act contrary to the following provision of the Code then in force:

> 4a (i) No trade union shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of... age....

The gravamen of this complaint, then, is that the Union adopted a policy of refusing to process a grievance relating to Mr. Hope's retirement because of his age.

The second complaint against the Union was not set forth in the original complaint (Exhibit 4) but was, in effect, an amendment to or enlargement of the original complaint permitted by this Board of Inquiry. Counsel for the Commission alleged as the basis for a second complaint the fact that the Union had negotiated a discriminatory condition in the applicable Collective Agreement and this constituted discrimination against "any person or member" because of age. In the present instance, the evidence suggests that the arrangements for mandatory retirement were put in place in 1946 at a time when the provisions of the Code relied upon were not yet enacted. The Commission's theory of the complaint, however, is that the annual failure to seek to remove a discriminatory arrangement in the Collective Agreement would constitute a further act of discrimination and would render the Union vulnerable to a complaint under s. 4a of the Code. There was no evidence relating to the negotiation of the Collective Agreement of 1975 between the employer and the Union which was in force at the time

of Mr. Hope's retirement. Accordingly, the theory put forward by the Commission is simply that the mere existence of a Collective Agreement containing or referring to a mandatory retirement scheme is evidence of a failure to negotiate removal of the scheme from the Agreement and that this itself constitutes a breach of the Code.

(ii) The Complaints of Mr. Jack Karr

Mr. Karr's complaint against the Corporation of the City of St. Catharines is identical in material respects to that of Mr. Hope. Mr. Karr joined the Grantham Township Fire Department on November 8th, 1958 and became, after the amalgamation of Grantham Township with the City of St. Catharines, a member of the St. Catharines Fire Department on November 8th, 1958. During his entire career with the Department he was a firefighter and was, at the time of his mandatory retirement on May 31st, 1980 a First Class Firefighter. It was alleged in his complaint that his mandatory retirement constituted a breach of the same provisions of the Code relied upon by Mr. Hope.

Mr. Karr's original Complaint (Exhibit 2) made no reference to the St. Catharines Professional Firefighters' Association. Inspired by the progress of Mr. Hope's complaint, counsel representing Mr. Karr sought to enlarge his complaint to embrace the respondent Association on the theory that the Association's failure to seek the removal of compulsory retirement from the Collective Agreement in force at the time of Mr. Karr's

retirement constituted a breach of the Code. The Board acceded to this request.

(iii) Complaint of Mr. Benjamin Whitney

Mr. Whitney brought a complaint against the Corporation of the City of St. Catharines in similar form to that of Mr. Hope and Mr. Karr. In Mr. Whitney's case, he was retired by the City on September 21st, 1979.

Mr. Whitney occupied the most senior position of the three St. Catharines' complainants. In June of 1958, after some ten or eleven years of service as a career and volunteer firefighter, he accepted the position of Chief at the Grantham Township Fire Department. After a merger of the two municipalities, Mr. Whitney joined the St. Catharines Fire Department as a Deputy Chief. Mr. Whitney's complaint alleges that his mandatory retirement is a contravention of the provisions relied upon by Mr. Hope and Mr. Karr.

B. Waterloo

A complaint was brought against the City of Waterloo by Mr. Karl Boatman. Mr. Boatman had joined the Waterloo Fire Department on January 1st, 1952. In 1959 he was promoted to the rank of Lieutenant and in 1965 to the rank of Captain, a position which he held until forced to retire on April 10th, 1981, when he attained the age of 60. In or about 1974, the Waterloo Firefighters' Association had negotiated a reduction in the

normal retirement date of all members of the Association applied by the City to age 60. This arrangement was reflected in the 1981 Collective Agreement (Exhibit 19) in force at the time of Mr. Boatman's retirement. The complaint characterizes this conduct as age discrimination in contravention of sections 4(1)(b) and 4(1)(g) of the Code.

C. Windsor

Mr. Peter Callen brought two complaints, one against the Corporation of the City of Windsor and certain of its servants and agents and a second against the International Association of Firefighters, Local 455 and its President at the time of Mr. Callen's retirement, Mr. Earl Turpin-Carroll.

In or about 1970, the City of Windsor and Local 455 had negotiated a collective agreement providing for a reduction in the normal retirement age from 65 to 60 for members of the Association employed by the City as firefighters. Mr. Callen's involvement in firefighting began with the Sandwich West Fire Department in 1959. During his career in Sandwich West, Mr. Callen was promoted to Lieutenant in 1963 and to Captain in 1964. Upon annexation of Sandwich West Township to the City of Windsor January 1st, 1966, Mr. Callen became a member of the Windsor Fire Department. Mr. Callen was not allowed to retain the rank of Captain. Sometime in 1977, however, he was promoted to the rank of Lieutenant. In 1979, he completed the examinations and was qualified for the rank of Captain and, although not promoted to

this rank, he has served on and off in the rank of Captain from that time until his retirement.

Prior to his retirement date of July 31st, 1982, Mr. Callen protested his prospective retirement and made representations to this general affect to the Corporation of the City of Windsor. A decision was taken by the City to abide by the terms of the Collective Agreement with respect to Mr. Callen and he was eventually notified in writing by the City Solicitor that he would be retired as of July 31st, 1982.

Mr. Callen alleges that his retirement constitutes a breach of the Human Rights Code 1981, which provides as follows:

> 4(1) Every person has a right to equal treatment with respect to employment without discrimination because of ... age, ...

It would appear that the 1981 version of the Code, by adopting more general language, embraces the various particular acts of discrimination set out in the earlier provisions relied on by the other complainants in this case. In this version, the Code defines "age" for these purposes in section 9(a) as "an age that is eighteen years or more and less than sixty-five years".

The principal focus of Mr. Callen's complaint against the respondent Union relates to what is alleged to be harassment by the Union and its officials relating to his protest of his forced retirement. In anticipation of his retirement, Mr. Callen retained a lawyer who wrote on his behalf to Mr. A.P. Angus, Personnel Director for the City, indicating that Mr. Callen did

not wish to retire at age 60 and noting that Mr. Callen viewed his retirement as a breach of the Ontario Human Rights Code. Copies of this letter were sent by his lawyer to a number of individuals, including Mr. Earl Turpin-Carroll. Photocopies of this letter were posted by the Union in all City of Windsor fire halls. On June 23rd, 1982, Mr. Callen's lawyer Mr. Juba wrote to Mr. Turpin-Carroll and advised him of the possible embarrassment that the posting of the letter would cause to Mr. Callen and advised that it was his position that this conduct amounted to a reprisal against Mr. Callen for his attempt to exercise his rights under the Human Rights Code and was therefore contrary to section 7 of the Code. Section 7 of the Code provides as follows:

> Every person has a right to claim and enforce his or her rights under this Act to institute and participate in proceedings under this Act and to refuse to infringe the right of another person under this Act, without reprisal or threat of reprisal for so doing.

On July 12th, 1982, Mr. Turpin-Carroll wrote to Mr. Juba advising him that the membership of the Union had instructed him to post the letter and indicating that there was, in his view, no intention to intimidate or coerce Mr. Callen in any way because of his actions.

Secondly, it was also Mr. Callen's position that his complaint should be enlarged to embrace a claim against the Union for its negotiation of the compulsory retirement scheme in 1978 and for failing to negotiate the removal of this arrangement in

the 1981 Agreement which was in force at the time of his retirement.

D. Enlargement of the Complaints

As indicated above, Counsel for the Commission sought to enlarge the theory of liability alleged against the respondent Unions by Mr. Hope and Mr. Callen to include an allegation that the failure of the Unions to negotiate removal of mandatory retirement in the pertinent Collective Agreements itself constituted a breach of the Code. In this, the Commission was supported by Counsel representing Mr. Hope and Mr. Karr. With respect to Mr. Karr, a submission was made to the effect that he should be permitted to bring a fresh complaint against his Union on the basis of this theory of liability.

This issue was the subject of considerable analysis by Counsel representing the parties to this proceeding. This discussion and the Board's ruling in favour of the complainants is to be found in the Transcript of these proceedings in Volume III at pages 102 - 143 and 153 - 181. The ruling itself is set out at pages 179 - 181. It is unnecessary to repeat that discussion in this decision but, inasmuch as the parties have attached such importance to the point, it may be useful to briefly indicate the nature of the reasons underlying the ruling in favour of the complainants.

The Board indicated that the Ontario Human Rights Code appears to envisage that Boards established under the Code should have a discretion to enlarge the scope of their inquiries beyond the precise terms of the complaint with respect to which the Board has been appointed. Support for this view may be drawn from provisions of the pre-1981 versions of the Code conferring on the Board a discretion to add additional parties to a proceeding upon such notice as the Board deems appropriate (section 14b (1) (e)) and which further stipulates that the Board, after hearing a complaint "shall decide whether or not any party has contravened this Act" (section 14c). Similar provisions are found in sections 38 (3) and 38 (1) of the 1981 Code. The cumulative effect of these provisions suggests firstly that a Board could conceivably add as a party an individual not named in the complaint and secondly, is entitled to inquire into any contravention of the Code revealed in the evidence whether or not the contravention is set forth in the original Complaint. With respect to the latter point, this interpretation draws strength not only from the "any matter" language of Section 14c but from the obvious point that it would be an odd reading of the Code that would permit Boards to add new parties but not to enquire into new matters concerning existing parties.

In effect, then, the original Complaint, although it establishes, broadly speaking, the terms of reference of the enquiry that the Board is appointed by the Minister to undertake, does not have the effect of limiting the enquiry to the very precise allegations made in the Complaint or to the suggested

legal analysis of them contained in the Complaint. It is not surprising that the Code should adopt such a position. In the first place, it should be remembered that the individual drafter of the Complaint will often, perhaps usually, be someone without legal expertise who may or may not appreciate the proper legal analysis of his or her situation and all of the material facts. Secondly, it would be remarkably inconvenient for all concerned, including Respondents, if too narrow a view of the focus of a particular enquiry were to result in a dismissal of a particular Complaint and the establishment of a further Board of Enquiry by the Minister to enquire into other allegations. Common sense thus argues in favour of a scheme in which a Board of Enquiry has some latitude in defining and redefining the scope of its enquiry.

The discretion conferred by the Code on Boards to enlarge the scope of their enquiry is not, of course, untrammelled. Most obviously, it is limited by the provisions of the Statutory Powers Procedure Act, R.S.O. 1980 c. 484, and by such common law doctrines of natural justice and the duty to act fairly as may be applicable to a tribunal of this kind. In exercising the discretion, then, a Board must be sensitive to the possible prejudice to a party not named in the original Complaint who is added to the proceedings and to a named party who finds that the terms of reference of the enquiry have expanded beyond those set forth in the original Complaint. No doubt the prejudice may often be removed through adequate notice. There may well be cases, however, where undue prejudice cannot be prevented through

this or any other device and in such cases, presumably, Boards of Enquiry will not enlarge upon their enquiries in the manner requested. The point remains, however, that Boards do possess the discretion to enlarge upon their enquiries in the manner suggested above. Similar interpretations of the Code are to be found in Cooper v. Belmont Property Management et al (July 27, 1973; Ratushny); Cousens v. The Canadian Nurses' Association (1981), 2 C.H.R.R. d/365 (Ratushny); and Tabar et al v. West End Construction Ltd. et al (1982), 3 C.H.R.R. d/1073 (Cumming). I do not view the decision of a tribunal established under the Canadian Human Rights Act in Local 916 Energy and Chemical Workers v. Atomic Energy of Canada Limited (1984), 5 C.H.R.R. d/2066, in which a motion to amend a complaint was denied, as persuasive authority to the contrary. Leaving aside the question of whether the federal Act has been correctly interpreted by the Tribunal in that case, it should be noted that the language of the federal Act can be more easily read as confining the enquiry to the specific complaint than can the language of the provisions of the Ontario Code.

In the present case, it was the Board's view that the relationship of the enlarged theory of liability to the original Complaints of Mr. Hope and Mr. Callen and the fact that Mr. Karr's complaint against the respondent union followed so closely the footsteps of Mr. Hope, suggested that no substantial prejudice was imposed upon the respondent union by permitting the enlargement of the enquiry requested by counsel for the Commission and the Complainants Hope, Callen and Karr.

E. The Position of the Respondents

The parties are essentially in agreement with respect to the facts relating to the retirement of each of the Complainants. That is to say, it is common ground that each of the Complainants was subject to a policy of mandatory retirement at age sixty. Moreover, it is common ground that forced retirement at age 60 would constitute discrimination on the basis of age unless the bfoq defence can be established by the Respondents. The term "age" is defined in Section 9 of the pre-1981 Codes as "any age of forty years or more and less than sixty-five years" and in Section 9 of the 1981 Code for these purposes as "an age that is eighteen years or more and less than sixty-five years".

While it would be acceptable under the Ontario Code, then, to retire employees at age 65, retirement at age 60 is subject to scrutiny under the anti-discrimination provisions of the Code.

Mandatory retirement at age 60 would be offensive to these provisions unless it can be defended under the bfoq defence. The pre-1981 versions of the Code set forth this defence in the following terms:

> 4 (6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for for the position or employment

The 1981 version of the Code contains an equivalent provision in the following terms:

> 23 The right under section 4 to equal treatment with respect to employment is not infringed where
>
> ...
>
> (b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment.
>
> ....

There are some differences between the wording of these two sections. Nonetheless, it appears to be accepted by counsel for all parties and it is the view of this Board that there is no difference between the two versions of the bfoq defence that is material in the present case. The addition of the term "reasonable" in section 23 may serve to emphasise an intention of the legislature that the bfoq defence contains an objective element. It was not the position of counsel for the Respondents, however, that the bfoq defence set forth in the pre-1981 versions of the Code contained no such element. Any doubt as to whether the pre-1981 Code bfoq test contained an objective element has been resolved by the decision of The Supreme Court of Canada in Ontario Human Rights Commission et al v. Borough of Etobicoke (supra). Similarly, the deletion of the phrase "and requirement" and the replacement of the phrase "for the position or employment" by the phrase "because of the nature of the employment" appear to represent differences in drafting style rather than matters of consequence.

In these proceedings, then, the Respondent employers have sought to establish that the age of sixty is a reasonable and bona fide qualification for the various jobs held by the Complainants in their respective Fire Departments.

The respondent unions have also relied on the bfoq defence and, indeed, simply adopted the evidence and arguments put forward by the respondent employers on this issue as their own. The unions also argued, however, that the theory put forward by some of the Complainants that the mere fact that the unions had failed to negotiate for the removal of references to mandatory retirement schemes in the applicable collective agreements constituted a contravention of the Code is unsound. As well, it has been submitted that Mr. Hope's union was under no duty to grieve his mandatory retirement. Further, it was submitted that the allegations of harrassment put forward by Mr. Callen were not grounded in fact and were based on a misunderstanding of union practices and procedures.

In short, although the respondent unions shared the employers' view that the age of sixty constituted a reasonable and bona fide job requirement, they were also of the view that whether or not the bfoq defence succeeded, the complaints against the unions should be dismissed on other grounds.

III. THE LAW PERTAINING TO THE BFOQ DEFENCE

It is evident that one of the central issues in the case relates to the burden of proof imposed by law on the Respondents in their attempts to successfully establish that the age of sixty is a reasonable and bona fide qualification for the jobs held by the Complainants. Considerable argument was directed to this issue by counsel, who canvassed a broad range of Canadian and American precedents on this question. Before turning to examine the evidence led with respect to the job descriptions of the particular Complainants, the nature of fire-fighting and various questions relating to the aging process, it will be useful to set out this Board's understanding of the elements of the bfoq defence.

The most important source of guidance on the proper interpretation of the bfoq defence is the decision of The Supreme Court of Canada in The Ontario Human Rights Commission et al v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14. In that case, the Supreme Court clearly indicated that the bfoq provision of the Ontario Code, even in its pre-1981 version, contained both a subjective and an objective element. On behalf of the Court, McIntyre J. set forth the subjective element in the following terms (at p. 19):

> To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of adequate performance of the work involved...not for ulterior or extraneous reasons...

The objective branch of the defence was described in this manner (at p. 20):

> In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economic performance of the job without endangering the employee, his fellow employees and the general public.

Further, the Court indicated at some length in this decision the kind of evidence that would be considered material in determining whether or not a particular employer was able to establish the bfoq defence. In passages of the Court's judgment which are reproduced in the introductory pages of this decision, McIntyre J. indicated (at pp. 22-23) that the judge should be provided with evidence concerning "the relationship between the aging process of the safe, efficient performance of those duties" including evidence which would "cover the detailed nature of the duties to be performed, the conditions existing in the workplace, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported". As well, it will be recalled, the Court stressed the desirability and persuasiveness of statistical and medical evidence based on observation and research on the question of aging rather than impressionistic evidence of the kind which had been led at the Board of Enquiry level in the Etobicoke case.

Additionally, and importantly, the Court in Etobicoke offered some guidance as to the nature of the test to be met by an employer in a field involving public safety attempting to establish a mandatory retirement age of less than sixty-five that

can be defended on the basis of bfoq. The nature of this test has been a matter of considerable controversy in the present case.

As a preliminary point, it should be noted that the Supreme Court was clearly of the view that it was at least conceivable that such a defence could be established. This is indicated in the following passage: (at p.20)

> Faced with the uncertainty of the aging process an employer has, it seems to me, two alternatives. He may establish a retirement age at 65 or over, in which case he would escape the charge of discrimination on the basis of age under the Code. On the other hand, he may, in certain types of employment, particularly in those affecting public safety such as that of airline pilots, train and bus drivers, police and firemen, consider that the risk of unpredictable individual human failure involved in continuing all employees to age 65 may be such that an arbitrary retirement age may be justified for application to all employees.

McIntyre J. went on to note that though it may be that in such a case some individuals would remain fit beyond the date of their retirement, the retirement age might be defended if the degree of risk to public safety attendant upon employee failure were sufficient to warrant a mandatory retirement scheme. These points are made in the following passage: (at pp. 20-21)

> In the case at bar it may be said that the employment falls into that category. While it is no doubt true that some below the age of 60 may become unfit for fire-fighting and many above that age may remain fit, recognition of this proposition affords no assistance in resolving the second question. In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a <u>bona fide</u> occupational qualification and requirement has been shown the board of inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those

> over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.

This test has been described for convenience by counsel for the Respondents as the "sufficient risk" test and is alleged by them to offer support for the view that where substantial risk to public safety is involved, the burden of proof imposed on the Respondents in establishing a bfoq is less burdensome than it might be in a case where no public safety factor were present.

Counsel for the Complainants has argued against this view and in doing so, has relied to a considerable extent on American authority. More particularly, it has been urged that the proper test to apply is that set out in Usery v. Tamiami Trail Tours Inc. (1976), 531 F. 2d 224 (U.S.C.A., 5th Cir.) a decision of a federal appellate court, offering an interpretation of equivalent although not identical provisions of the U.S. Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §621 et seq. ("A.D.E.A.") The issue in that case pertained to a minimum hiring age for bus drivers for service on inter-city bus routes. Parenthetically, it is of interest to note that one of the obvious purposes of age discrimination legislation is to render inoperative maximum hiring ages which cumulatively have the effect of decreasing employment opportunities for the middle-aged unemployed. Employers might have a variety of reasons for preferring to hire only younger employees. The effect of the Ontario provisions, and legislation elsewhere, is to strike down such hiring practices unless they can be upheld on the basis of a bfoq.

In Tamiami, the tour operator sought to defend the hiring practice on the basis that seniority rules in the workplace had the effect of requiring new employees to spend approximately ten years on so-called "extra board" service which meant that they would be essentially on 24-hour call and would frequently be required to go on short notice on early morning inter-city runs. It was the employer's view that such service was particularly demanding and better done by younger employees. The hiring practice was thus defended on the basis of public safety concern with respect to the performance of drivers over forty during their first ten years of service.

Maximum age hiring practices would appear to be particularly difficult to defend inasmuch as it will undoubtedly inevitably be the case that there will be many employees over the hiring age who are effectively rendering what is apparently reasonably safe service. Thus, there would be many drivers in the Tamiami work force over that age. The employer in Tamiami further argued, however, that older bus drivers can compensate for their decline in physical attributes as they age by choosing day shifts and shorter routes. Further, the employer argued that there were no available tests which could accurately identify those drivers not yet affected by the more crucial age-related, accident-causing impairments such as loss of stamina, etc.

In the event, the District Court accepted this evidence and sustained the defendant's hiring practices and this decision was upheld in the Court of Appeal. In reaching this conclusion, the

Court articulated a test for the successful establishment of the bfoq defence that it had itself developed in a previous decision in Weeks v. Southern Bell Telephone et al (1969), 408 F 2d 228 and which it repeated in the Tamiami opinion in the following terms: (at p. 236)

> ...Tamiami faces the second, double-facetted prong of the bfoq test set out in Weeks: whether it had reasonable cause, that is, a factual basis, for believing that all or substantially all persons over 40 would be unable to perform safely and efficiently the duties of the job involved, or whether it is impossible or impractical to deal with persons over 40 on an individualised basis.

Counsel for the Complainants thus argues that the Respondents in the present case must establish either that all or substantially all firefighters over the age of sixty are unable to perform effectively or that it is impossible or impractical to deal with such employees on an individualised basis, presumably because their deficiencies cannot be identified through testing of various kinds with sufficient accuracy. We shall refer to this as the "Tamiami test".

The Respondents argue that the Tamiami test does not represent the law of Canada and establishes too high a hurdle for employers in a case in which public safety is at issue. Support for this view is drawn from another American appellate decision, Hodgson v. Greyhound Lines Inc. (1974) 499 F 2d 859 (U.S.C.A., 7th Circ.). This was also a case of maximum age hiring practices dealing with inter-city bus drivers. In Hodgson, the employer sought to uphold an age 35 maximum on the basis of the "extra board" practices discussed in Tamiami. Although the employer failed in the trial court, the bfoq was upheld in the Court of

Appeal. The "all or substantially all" test of the Weeks case was said to be irrelevant by the court in Hodgson on the basis that Weeks was not a case in which public safety was at issue. Weeks in fact was a sex discrimination case in which a railway attempted to defend a practice of hiring males only for the position of switchman. The Hodgson court summarised its views on the nature of the bfoq test in the following terms: (at p. 863)

> Due to such compelling concerns for safety, it is not necessary that all or substantially all bus driver applicants over 40 could not perform safely. Rather, to the extent that the elimination of Greyhound's hiring policy may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate, however, a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardise the life of one more person than might otherwise occur under the present hiring practice.

As might be expected, the Respondents argue that this reasoning is precisely applicable to the facts in the present case. The Respondents further argue, moreover, that the language of Hodgson is more consistent with the "sufficient risk" language of our Supreme Court's judgment in Etobicoke than is the "all or substantially all" test of Tamiami. Indeed, it must be noted that in Etobicoke, McIntyre J. referred (at p. 23) to Hodgson as an authority "of particular interest" to the "question of sufficiency and the nature of evidence in such matters". Further, the Respondents note that there is a difference in the wording of the American A.D.E.A. bfoq test which permits the

defence to be raised only where the requirement is "reasonably necessary to the normal operation of the particular business" (emphasis added).

This matter is not one which, in my view, is settled by either the reference to Hodgson in Etobicoke or by the differences in wording between the American and Canadian legislation. As far as Etobicoke is concerned, although it is evident that the Hodgson case was referred to approvingly by the Court, it was not referred to with respect to the precise question of the appropriateness of the "all or substantially all" test. As far as the statutory language is concerned, although it is true that the American "reasonably necessary" could be read differently from the "reasonable...qualification" language of the Ontario Code, I am not convinced that it would be consistent with the Etobicoke decision to do so. McIntyre J., in describing the objective branch of the test, stated (at p. 20) that the qualification must be "reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public". Accordingly, the competing merits of the Tamiami and the Hodgson tests require some assessment.

It is of considerable interest that this issue has been authoritatively resolved in the American jurisprudence by the American decision of the U.S. Supreme Court in Western Airlines v. Criswell et al. (1985), 105 S.Ct. 2743. In Criswell, the Supreme Court reviewed a mandatory retirement policy of an

airline which required both pilots and flight engineers to retire at age sixty. A number of flight engineers retired at age 60 and a number of pilots who had been denied reassignment as flight engineers upon reaching age 60 challenged this policy under the A.D.E.A. The employer sought to sustain this policy on the basis of a bfoq defence arguing, in part, that in a case where public safety is at issue, it is sufficient for the employer to establish a "rational basis" for the policy in question. The Supreme Court disagreed with this approach and adopted the Tamiami standard as the appropriate basis for assessing a bfoq defence.

It must be emphasised, however, that it was not the Supreme Court's view that the public safety element was irrelevant. Rather, it was the Court's view that the concern for public safety would be relevant in determining whether the employer had established reasonable qualifications for the job in question. In raising a bfoq defence, the employer will have to define its expectations as to the qualifications or performance capacities necessary to perform the job in question. The employer will then attempt to demonstrate that employees above a certain age will not have these qualifications or capacities. It was the Supreme Court's view in Criswell that the public safety factor is highly relevant in determining whether or not the stipulated qualifications are "reasonably necessary to the normal operation of the particular business". Once a court is satisfied that the qualifications are justifiable, the second branch of the enquiry is undertaken in order to determine whether or not the particular

mandatory retirement age identifies, with sufficient accuracy, a group of people who no longer possess the qualifications in question. In turn, this could be established by showing either that "all or substantially all" employees at the stipulated age would no longer possess the qualifications or, alternatively, by demonstrating that it is "impossible or highly impractical" to deal with employees on an individualised basis in the sense that one can, in a practical way, test them for the presence of the qualifications at issue. This was, in fact, the approach taken in Tamiami. In Criswell, the Supreme Court summarised the substance of the Tamiami opinion in the following terms: (at pp. 2751-52)

> First, the court recognized that some job qualifications may be so peripheral to the central mission of the employer's business that no age discrimination can be "reasonably necessary to the normal operation of the particular business". (29 U.S.C. §623(f)(1). The bus company justified the age qualification for hiring its drivers on safety considerations, but the court concluded that this claim was to be evaluated under an objective standard:
>
> > [T]he job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of his business - here, the safe transportation of bus passengers from one point to another. The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in the case of an accident, the more stringent may be the job qualifications designed to insure safe driving. 531 F 2d, at 236.
>
> This inquiry 'adjusts to the safety factor' by ensuring that the employer's restrictive job qualifications are "reasonably necessary" to further the overriding interest in public safety. In Tamiami, the court noted that no one had seriously challenged the bus company's safety justification for hiring drivers with a low risk of having accidents.
>
> Second, the court recognized that the ADEA requires that

> age qualifications be something more than 'convenient' or 'reasonable'; they must be 'reasonably necessary...to the particular business,' and this is only so when the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry. This showing could be made in two ways. The employer could establish that it 'had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved. In Tamiami, the employer did not seek to justify its hiring qualification under this standard.
>
> Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis. One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class.' In Tamiami, the medical evidence on this point was conflicting, but the District Court had found that individual examinations could not determine which individuals over the age of 40 would be unable to operate the buses safely. The Court of Appeals found that this finding of fact was not 'clearly erroneous,' and affirmed the District Court's judgment for the bus company on the BFOQ defense. (footnotes omitted)

In Tamiami, it will be recalled, the bus company argued that a certain level of physical and psychological fitness was necessary in order to enable new employees to endure the rigours of "extra board" service. The view of the Tamiami court was that in determining whether or not this employer requirement was a reasonably necessary one, it was highly relevant to consider the public safety implications of employee failure. The U.S. Supreme Court, in Criswell, agreed with this view.

Indeed, it should be pointed out that both courts stressed the importance of taking into account considerations of public safety when making this assessment and the desirability of giving

employers some latitude on this issue in cases of this kind. The Supreme Court put this point in the following manner in Criswell (at p. 2754):

> When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case. The employer cannot be expected to establish the risk of an airline accident 'to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.' Usery v. Tamiami Trail Tours, Inc., 531 F. 2d at 238. When the employer's argument has a credible basis in the record, it is difficult to believe that a jury of lay persons - many of whom no doubt have flown or could expect to fly on commercial air carriers - would not defer in a close case to the airline's judgment. (footnotes omitted)

This is not to say, of course, that generous assumptions are made in favour of employers in any case where public safety is involved. In the Criswell case itself, for example, the court upheld a finding that the employer had not discharged the burden of demonstrating that age 60 was a reasonable bfoq for flight engineers.

Once the employer's qualifications are established as being appropriate in light of public safety concerns, the analysis then turns to the second issue, that is whether a mandatory retirement scheme is a defensible means of achieving the objective of ensuring that employees have this qualification. In Criswell, the Supreme Court adopted the view that the mandatory retirement age would be defensible if either "all or substantially all" employees no longer possessed the qualifications at the age in

question or, alternatively, even if this were not the case, it would be "impossible or highly impractical" to identify the deficient employees through other means. The second branch of the test would be satisfied, presumably, by demonstrating that there was no feasible means of testing employees on an individual basis for the attributes in question.

I find this to be an illuminating analysis of the factors that would lead one to conclude that a particular mandatory retirement age was or was not a bfoq. Assuming that the qualifications insisted upon by the employer were reasonable in the light of public safety concerns, the question surely is simply whether age alone is a satisfactory proxy for determining the absence of the attribute (as it would be if "all or substantially all" of the employees at this age lack the attribute in question) and, if not, whether there is some satisfactory means of identifying the deficient employees. If there is no such method, the employer is permitted to fall back on the no less unsatisfactory method of simply having a retirement age. Surely it would not be open to the employer to demonstrate that even though a substantial number of employees are capable of discharging their responsibilities beyond the retirement age and even though there is a satisfactory means of testing the capacities of these employees, the employer chooses not to do so because there is some element of public safety involved. It is this that is precluded by the Criswell analysis and it appears to me to be perfectly consistent with the analysis in Etobicoke that employers would not be able to defend such an

approach under the Ontario Code. The preference of the Code is for individualised treatment, even in cases of occupations with a public safety dimension, where this is a practical alternative to an arbitrary mandatory retirement age.

I draw some support for this view from the concurring opinion of MacGuigan J. in Re Air Canada and Carson et al. (1985), 18 D.L.R. (4th) 72 (Fed.C.A.) in which he reviews some additional cases adopting the views set forth in Criswell and, if I understand the thrust of the opinion, the suggestion is made that the American analysis is an acceptable elaboration or extension of the Etobicoke analysis and is consistent with the tests set out by McIntyre J. in that case. MacGuigan J. suggests (at p. 90) that the American test is "a more proximate stage" in the bfoq analysis mandated by Etobicoke. By this he appears to mean that the analytical model provided by the American material is a reasonable prelude to reaching the judgment called for in Etobicoke as to "whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of the safety of the employee, his fellow employees and the public at large." 132 D.L.R. (3d) 14 at p. 21.

Although Criswell does suggest that there is a clear bifurcation between the first step in the analysis, within which the public safety element becomes relevant, and the second step in which the particular age qualification is measured against the two prongs of the Tamiami test, it may well be that so strict a

division is not desirable. Thus, it may well be that in determining whether or not it is "practical" to engage in individualised testing of employee capacities, the accuracy of the tests themselves may become an issue. Indeed, it may be that there are very few contexts within which absolutely accurate testing is possible. In determining whether a particular testing arrangement is satisfactory for the employer's purposes, it may well be appropriate to require a higher level of accuracy in testing where defective performance by an employee creates a substantial risk to public safety. Subject to this one possible gloss, however, I am persuaded that the analysis adopted by the Supreme Court in Criswell offers a useful analytical framework within which to apply the test set forth in the Etobicoke decision by the Supreme Court of Canada.

In summary, then, the following guidelines for the interpretation of the bfoq provision in the Ontario Code can be drawn from the decision of the Supreme Court in Etobicoke:

1. The respondent must satisfy both the subjective and objective branches of the Etobicoke test, i.e., that the mandatory retirement is imposed honestly and in good faith and is related in an objective sense to the performance of the employment concerned (in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees or the general public. (p.20)

2. Where, as in the present case, there is a public safety dimension to the occupation, the adjudicator must determine whether 'there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employer, his fellow employees and the public at large. (p.21)

3. In making the determination indicated in item 2, it is appropriate to first determine whether the qualification imposed by the employer is reasonably necessary in light of the public safety implications of the occupation in question and secondly, to determine whether all or substantially all of the employees at the mandatory retirement age would not be able to meet the qualification in question or, alternatively, whether the qualification is such that it is impossible or impractical to make individualised assessments of employees.

4. The adjudicator must consider evidence relating to the duties to be performed by the employee, the conditions existing in the workplace and the effect of such conditions upon employees at or near the retirement age sought to be supported. As well, evidence concerning the relationship between the aging process and the safe, efficient performance of the duties would be required and in this regard, 'statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, would certainly be more persuasive' than anecdotal evidence of individuals familiar with the workplace environment in question. (at p.23)

Finally, it may be noted that the underlying premise of the reasoning in Etobicoke is that it is at least conceivable that a bfoq defence can be established with respect to a mandatory retirement age and accordingly, the Code ought not to be interpreted in such a way as to preclude such a finding. Thus, it is not surprising that in a number of cases age requirements of various kinds have been upheld in the Canadian case law. See, for example, Re Manitoba Human Rights Commission et al and City of Winnipeg et al (1983), 144 D.L.R. (3d) 353 (Man. C.A.); Moose Jaw et al v. Saskatchewan Human Rights Commission et al, [1984] 4 W.W.R. 468 (Sask. Q.B.); Saskatchewan Human Rights Commission et al v. Saskatoon et al (1985), 37 Sask. R. 1 (Sask. Q.B.) Although these are cases that have upheld the mandatory retirement ages, it is not suggested, of course, that these

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January 13, 1987

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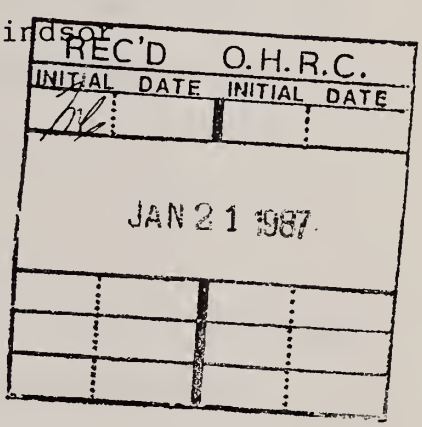

Hope et al v. City of St. Catharines et al

Ms. S. Liang of the Sack, Charney firm has drawn my attention to the fact that two lines have been dropped from the first paragraph on page 38 of the copy of the Award in this matter, previously circulated to you.

The eighth and ninth lines of that paragraph read as follows in the full draft:

> mandatory retirement age would not be able to
> meet the qualification in question

I enclose, with apologies for the inconvenience, a corrected version of the full page.

John D. McCamus

Enc:

decisions are of any assistance on the particular facts of the present case. There are also cases, such as Etobicoke and City of Winnipeg v. Ogelski and the Manitoba Human Rights Commission et al (Unrep., Man. Q.B., Wright, J., Oct. 15, 1985) in which such restrictions have not been upheld and indeed, the greneral burden of the analysis in Etobicoke is to the general effect that each case must turn on its particular facts and the evidence relating to the various elements of the bfoq. The point for present purposes, however, is simply that it would be inconsistent with Etobicoke to adopt a reading of the Code which made it virtually impossible for employers to establish a bfoq defence in a case involving an occupation with a public safety element.

Against this background, then, we turn to a consideration of the particular facts underlying the complaints forming the subject matter of this proceeding.

IV. THE DUTIES TO BE PERFORMED AND THE CONDITIONS OF THE WORKPLACE

Considerable evidence was led by both the Complainants and the Respondents with respect to the actual job descriptions of the individual Complainants and with respect to the general nature of fire-fighting. The cumulative effect of this evidence was to leave one very impressed with the burdensome nature of this occupation and very appreciative of the efforts of those who devote their careers to this important line of work.

The hierarchy of ranks in each of the three respondent fire departments is essentially the same. Moving from the lower rank to the highest rank, members of the department will hold ranks from fire-fighter (which may contain sub-divisions from probationer up to first-class fire-fighter), lieutenant (which also may be sub-divided into second and first class), captain, platoon chief, deputy chief and chief. The complainants in the present case were, at their time of retirement, a fire-fighter (Karr), a lieutenant (Callen), a captain (Boatman), a platoon chief (Hope) and a deputy chief (Whitney). All ranks below the rank of chief were thus represented in this proceeding and accordingly, the cumulative effect of the evidence of the complainants, the evidence of the respondents' witnesses, together with documentation in the form of organizational charts, job descriptions for all ranks, pictures, brochures and the like, was to give a very full and complete account of the organisation

of the work of a fire department in each of the three municipalities.

It is unnecessary to produce an account of this material inasmuch as the single and most important fact pertinent to the employer's defence of the mandatory retirement age is that employees in each of these ranks are required to engage in what has been referred to in these proceedings as "hands on" fire-fighting. That is to say, members of the respondent fire departments from the rank of fire-fighter up to the rank of deputy chief are all required to engage in the physical task of fighting fires. To be sure, those who hold the rank of fire-fighter spend more of their time engaged in this activity than deputy chiefs. It is nonetheless true that deputy chiefs themselves are required, from time to time, to engage in the very demanding physical tasks which will be very briefly described below.

It is very important to note that it is no part of the Complainants' case that the work of these fire departments could be reorganised in such a way as to create jobs which would not involve "hands on" fire fighting. Thus, it was not suggested that individuals of more senior ranks such as Platoon Chief or Deputy Chief could be confined to a purely supervisory activity and not required to become actively involved in the physical aspects of fire-fighting itself. The Complainants and the Commission appear to accept that the current organisation of the workload within the respondent departments is an acceptable basis

for testing the complaint made with respect to mandatory retirement.

Moreover, the evidence clearly establishes that at the rank of Deputy Chief, for example, there is no question but that individuals holding this rank do in fact engage in "hands on" fire-fighting from time to time. Quite apart from the evidence led indicating that this was part of the employers' expectation of individuals holding this position, Chief Stewart of the City of Windsor Fire Department, for example, testified with respect to his experiences of fire-fighting as a Deputy Chief (transcript, Vol. IV, pp. 68 et seq.). Chief Stewart recounted a number of incidents involving very demanding, direct, personal involvement in the physical aspects of fire-fighting, occasionally for long periods of time and occasionally with resulting injuries. Similar, if less dramatic, evidence was offered by Deputy Chief Whitney (Transcript, Vol. III, pp. 89 et seq.).

Moreover, although it is true that more senior officers will less frequently be involved in handling fire-fighting than Firefighters, expert evidence led in these proceedings suggested that this did not in any way render the physical demands placed on senior officials less burdensome or risky. Indeed, the fact that people who were normally more sedentary than those at junior ranks would unpredictably be called upon for strenuous physical exertion suggested both that they were less likely to be able to discharge the task adequately and further, that in engaging in

such activity they were incurring greater risk to their own health and safety.

In short, then, I am persuaded that each of the Complainants is required, as a routine matter of duty, to engage in fire-fighting. As is obvious, the blend of this particular task with more sedentary activities such as basic maintenance work at the fire station or supervisory work varies considerably from one rank to the next.

The basic elements of "hands on" fire-fighting are sufficiently obvious as not to require description here in detail, but numerous witnesses described the basic chronology of a fire-fighting episode and the kinds of tasks that firefighters may be called upon to perform. Witnesses stressed the physically demanding nature of the work. Much of the equipment to be handled is very heavy. The hauling and moving of charged hoses, for example, is very heavy work. Firefighters wear a considerable amount of equipment, including protective gear and so-called Scott airpacks, the total weight of the gear worn in the course of firefighting being estimated at something in the order of 65 lbs. As well, they are likely to be carrying equipment such as axes or hoses. Firefighters so equipped are required to engage in rather athletic activity, climbing ladders, climbing stairwells, sometimes in very tall buildings, breaking through windows, doors and walls, managing hoses, climbing up on roofs, and so on. Importantly, rescue work at the fire scene may

be particularly difficult, involving on occasion very considerable personal danger and the burdensome task of removing unconscious persons from a burning building.

It is evident that the work, apart frorm being physically demanding, is very stressful. A number of witnesses identified rescue situations as being particularly stressful and, of course, especially demanding from a physical point of view inasmuch as these situations call for the supreme effort.

Again, members of all ranks may be called upon to enter a burning building and engage in fire-fighting. The environment is not only psychologically stressful but of such a nature as to add to the physical demands of the job. The presence of smoke and tremendous heat can not only complicate the task of finding one's way around in a building (and, indeed, escaping from it if need be) but also creates an environment in which the physical strain of an already-demanding set of tasks is considerably increased. Further, many witnesses described the phenomenon of leaving a burning building, wet and heavily perspiring, only to encounter the rigours of winter weather in each of the respondent municipalities. There is thus the added physical stress of moving from extreme heat to extreme cold and back again as the work progresses.

The job is also obviously one which requires considerable common sense and good judgment. Witnesses of all ranks describe the process of approaching the scene of the fire and "sizing up"

the situation. "Sizing up" refers to the process of assessing the situation and determining what steps should be taken to fight the fire or effect necessary rescues. Good judgment is required in many other specific actions undertaken by individuals of all ranks in carrying out their fire-fighting tasks.

Evidence was also led with respect to the general nature of the municipalities in each case. All are sufficiently large municipalities to contain a broad range of heavy and light industrial and commercial environments, large institutional settings such as hospitals and schools, a variety of transportation facilities and large residential areas. Each municipality has some high-rise office and apartment towers which, of course, complicate the task of fire-fighting.

Considerable emphasis was placed by many witnesses, including some of the expert witnesses, on the fact that fire-fighting, at least in the initial stages of fighting a particular fire, is an externally paced activity in the sense that one must typically work at an optimal level of effectiveness for at least twenty minutes or so, before any break in activity or relaxation can be obtained. Depending on the circumstances, of course, it may well be a longer period of time before an individual fire-fighter may be able to take a rest but, as will be explained in subsequent sections of this decision, the requirement that one must be able to sustain a high level of activity for at least an uninterrupted period of twenty minutes or so was thought by many witnesses to be a basic requirement of the job.

Some evidence was also led with respect to other kinds of emergencies in which fire-fighters become involved. Although some of these stories were indeed quite harrowing, they did not appear to involve tasks that were generally more burdensome or more risky than fire-fighting itself.

In summary, and at the risk of belabouring the obvious, fire-fighting is an extremely demanding job from a physical point of view, conducted in an atmosphere of emergency in which there is considerable psychological stress and in working conditions which are both dangerous and such as to intensify the physical strain endured by each fire-fighter. The job requires the individual to be able to apply sound and swift judgment in these difficult circumstances. Although it is true that the actual task of fire-fighting occupies far from all of the time of individuals of each rank, this appears to make the job a more demanding one inasmuch as individual fire-fighters will be called, on short notice, perhaps in the middle of the night, to shift from more-or-less sedentary activity to a task which is physically very burdensome and psychologically very stressful.

As might be expected, it is the position of the Respondents that individuals who are not sufficiently fit to carry out these tasks are a danger to themselves, to their fellow employees and to the public at large. Indeed, the proposition that employee failure carries grave implications for the safety of fellow

workers and for the general public was not seriously challenged in these proceedings.

Against the background of these facts, I am satisfied that the requirement of the respondent employers that fire-fighters must possess a level of physical fitness and mental acuity to engage effectively in "hands-on fire-fighting" of the kind described above is a reasonably necessary requirement in the light of the role performed by fire departments, the manner in which their work is organised and the risk to public safety and the safety of fellow employees resulting from defective performance.

V. THE SUBJECTIVE ELEMENT OF THE ETOBICOKE TEST

It will be recalled that in Etobicoke, MacIntyre J. stated that an employer who wishes to establish mandatory retirement at a fixed age as a bfoq must establish that the limitation is imposed honestly and in good faith in the sense that it is imposed in the interests of adequate performance of the work involved and not for ulterior and discriminatory reasons. This branch of the Etobicoke test is easily met on the facts of the present complaints.

It was apparent from the evidence of many witnesses that there is a widespread belief in the fire-fighting community that the older fire-fighter is not only incapable of doing the job properly but also is at greater risk of injury and of medical problems such as heart failure. Some witnesses also indicated that, quite apart from problems encountered at work, it was believed by many that firefighters were less likely than others to enjoy a lengthy retirement as a result of the physically strenuous nature of their work. It was the evidence of union officials that provincial and, indeed, the international organisation of fire-fighters had recommended the reduction of the retirement age for fire-fighters generally and, more particularly, to age 60 from age 65 in Ontario through the 1960s and 1970s. The evidence also indicates that this view is shared by the Chiefs who testified in these proceedings and constitutes the basis on which a number of Ontario municipalities have reduced the mandatory retirement age for fire-fighters from 65 to 60.

Quite apart from the general evidence with respect to union and management attitudes concerning the question of mandatory retirement, however, there was specific evidence from the respective fire chiefs and union officers to the effect that mandatory retirement was supported by them on this basis at the time of the retirements which form the subject matter of the present complaints. With respect to two of the three respondent municipalities, there is direct evidence of the importance of these attitudes at the time when mandatory retirement at age 60 was introduced in Windsor in 1971 and in Waterloo in 1973 or 1974.

As far as St. Catharines is concerned, mandatory retirement at 60 was introduced in 1946 and no direct evidence was led relating to the discussions which preceded its introduction. It was Mr. Gray's submission on behalf of the City of St. Catharines that the subjective test is met by the evidence of Chief Fitzgibbon and others which indicates that retirement at age 60 has been supported at all recent times material to these complaints, on the basis of a concern for the health of firefighters and the safety of fellow employees and the public at large. That is to say, even if mandatory retirement had been introduced for some other reason in 1946, it is argued that the subjective element of the Etobicoke test is met as long as the rationale for the mandatory retirement scheme at the time of the

retirement in issue is consistent with the bfoq defence raised by the employer.

I find this reasoning persuasive. Otherwise, it would be highly difficult if not impossible to defend long standing practices under the provisions of the Code. Moreover, it does not seem inconsistent with the general policy of the Code to permit employers to adopt new rationales for old practices that are consistent with the Code. Although it may well be that shifting rationales should be subjected to careful scrutiny, there would appear to be no reason in principle for refusing to find that an employer who thought he was in compliance with the Code at a particular point in time was acting honestly within the meaning of the subjective element of the Etobicoke test.

Moreover, there is simply no evidence in the present case that would suggest some ulterior motive for the reduction of the retirement age from 65 to 60 in each of the municipalities. Indeed, the evidence strongly suggests that the unions and employers alike thought that a benefit was being conferred on employees by reducing the retirement age and restructuring the pension plans in order to accommodate this earlier retirement scheme.

VI. THE OBJECTIVE ELEMENT OF THE ETOBICOKE TEST

The great bulk of the evidence led in these proceedings by the respondents was directed to the second branch of the Etobicoke test, that is, the requirement that the mandatory

retirement age "must be related in an objective sense in the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public". (at p. 20, per McIntyre, J.) In Etobicoke, of course, the Court stressed the importance of medical and statistical evidence relating to the impact of the aging process. In the present case, a considerable body of evidence of this kind was presented to the Board. Over a period of approximately two weeks, an impressive array of physiologists, cardiologists and a psychologist testified with respect to (i) the effects of aging on physical fitness, (ii) the increasing incidence of coronary artery disease with increasing age and (iii) the general decline in cognitive functions that accompanies the aging process. It was the respondents' submission that this evidence identified a number of important sources of defective performance: namely, fatigue, inadequate physical strength, the possibility of cardiac events and declining ability to perceive accurately and to make sound judgments in the context of the emergencies encountered in firefighting.

In addition to this medical and statistical evidence, moreover, the respondents placed some emphasis on the impressionistic or anecdotal evidence presented by the firefighters who testified in this proceeding. It was noted that McIntyre J. in Etobicoke did not state that such evidence was

irrelevant and to be discounted entirely. Rather, it was His Lordship's view that medical and statistical evidence, though it may not be absolutely necessary in all cases, will be more persuasive than the impressions of individuals who have been engaged in firefighting as a career. It is to this impressionistic evidence we first turn before summarizing the general thrust of the medical and statistical evidence.

A. The Impressionistic Evidence

Counsel for the respondents suggested that three different types of evidence relating to the views of firefighters concerning retirement at age 60 were of assistance. First, it was noted that the belief that it is appropriate for firefighters to retire at age 60 for reasons of their personal health and for the safety of fellow employees and the general public is very widely held in the firefighting community. The union movement of firefighters in North America has promoted early retirement as a concept for these reasons for the last two or three decades. The respondents submit that this apparently wide-spread consensus of those most capable of direct observation of the deficiencies of the older employee and, indeed, of those whose personal safety is most directly implicated by the deficiencies of older employees, is entitled to some weight in a proceeding of this kind.

Secondly, the respondents argue that the mere fact that the parties to the present proceeding, in Windsor and Waterloo at

least, have freely bargained for mandatory retirement at age 60 and, in the case of St. Catharines, would be minded to do so if there were not such a scheme already in place is itself prima facie evidence of the reasonableness of this arrangement. Support for this view was drawn from the opinion of O'Sullivan, J.A. in Re Manitoba Human Rights Commission et al. and City of Winnipeg et al. (1983), 144 D.L.R. (3d) 353 (Man. C.A.). In this case, the Manitoba Court of Appeal upheld a mandatory retirement policy at 60 years of age for staff inspectors in the Winnipeg Police Department. O'Sullivan, J.A. dissented on the ground that the retirement policy in question applied to a broad range of occupations, not just staff inspectors, and therefore was vulnerable to attack. With respect to the mandatory retirement of staff inspectors at age 60, O'Sullivan, J.A. was of the view that this was a defensible policy. In the context of explaining this view, O'Sullivan, J.A. indicated in the following terms that he would be inclined to place considerable reliance on arrangements which were the result of free bargaining (at p. 362):

> What is reasonable in the circumstances is, I think, much more a matter of opinion than of drawing logical answers from scientific data. Searching for the answer to such a question is not unlike the search for an answer to the question of what is a just price or a just wage. It is easy to say that no one should charge an unreasonable price or demand an unreasonable wage, as traditional moralists often say, but how to decide what is reasonable? The solution adopted with respect to the reasonableness of prices and wages in our society has been to say that, subject to minimum protections and apart from

> monopoly situations, where parties are free, that is fair which is agreed. On the question of compulsory retirement age, where there is free collective bargaining, I should think a similar rule might apply: what is agreed should be accepted as fair and reasonable. Given free collective bargaining, the parties will know what is reasonable better than judges or experts. This is not to say that it is possible for citizens to contract out of the benefits conferred by human rights legislation but only to say that rules emerging from the free collective bargaining process are likely to be accepted as being in compliance with the legislation in so far as the requirement of reasonableness is concerned.

This opinion is not, of course, in any sense a binding authority for present purposes. Nor, however, do I find the reasoning persuasive. With respect, there appear to be a number of differences between wage bargaining and bargaining for an early retirement age. Most importantly, legislatures across the country have signalled, through human rights legislation, a public concern with respect to the possibility of discriminatory attitudes concerning older workers. If there is no legislated definition of a fair wage, then, there is a legislated definition of the kinds of attitudes that must not be involved in the negotiation of mandatory retirement. Accordingly, tribunals applying such legislation must be vigilant to ensure that arrangements and agreements concerning older workers are not animated by attitudes of this kind. Further, arrangements concerning retirement may well give rise to a conflict in the interests of younger and older workers and, indeed, amongst older workers themselves, which may be quite unrelated to concerns

about the capacity of older workers to discharge their responsibilities. These conflicts do not, I think, find a precise parallel in bargaining for wages although, there too, conflicts between young and old may no doubt arise. In any event, I am satisfied that there is no persuasive reason in favour of a prima facie rule or presumption in favour of freely negotiated arrangements. The fact that a compulsory retirement scheme finds its way into a collective agreement does not, in my view, add any weight to whatever weight should be given to the fact that many involved in the workplace are apparently of the view that such an arrangement is desirable.

The third type of impressionistic evidence relied on by the respondents links the lengthy description of the burdensome nature of firefighting work offered by many witnesses with the opinion of witnesses brought forward by the respondents who were of the view that older workers are unable to discharge these responsibilities effectively. Anecdotal evidence was offered with respect to situations in which older workers were unable to, for example, work inside burning buildings because of their health situation, unable or unwilling to go out on emergency calls in the middle of the night and, more generally, creating situations in which the younger workers had to "carry" them in the sense that they would have to adjust for the fact that older workers would not be able to undertake as heavy a burden as the younger workers.

In the present case, it is unnecessary to decide whether a bfoq could be successfully established on the basis of evidence of this kind. On the face of it, it would appear that the evidence led in this proceeding is more persuasive than the impressionistic evidence led in the Etobicoke case which was disparaged by McIntyre, J. as "the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is a 'young man's game' " (at p. 23). In the present case, detailed evidence was led with respect to the onerous nature of firefighting and, at the very least, it may be said that the impressionistic evidence of the respondents' witnesses is troubling and creates strong support for the proposition that the employers' belief that older firefighters cannot perform with sufficient effectiveness is very genuinely held.

Whether this impressionistic evidence is sufficient to support a finding on the objective branch of the Etobicoke test is a question this tribunal need not answer inasmuch as a very substantial volume of medical and statistical evidence has been provided as well. As will be seen, that evidence supports the view that very few, if any, firefighters beyond the age of 60 can effectively discharge their responsibilities in the context of fighting actual fires.

B. The Statistical and Medical Evidence

The statistical and medical evidence presented in this proceeding dealt with essentially three questions. First, the evidence of physiologists was led with respect to the decline in physical fitness that accompanies aging. Secondly, the evidence of cardiologists was led with respect to the increased incidence of coronary artery disease with advancing years. Thirdly, evidence was led with respect to the decline in mental capacities of various kinds. The evidence led in response by the Commission and the complainants was essentially consistent, as far as matters of medical science are concerned, with the evidence led by the respondents. The point of the reply evidence and of much of the cross-examination effected by Commission Counsel was to attempt to establish that the declining capacities of firefighters could be adequately tested and that testing batteries of various kinds could provide a practical substitute for a compulsory retirement scheme. In each case, then, it will be necessary to consider not only the medical and statistical evidence of decline but the practicability of individualised testing of individual capacity.

(i) Physical Fitness, Aerobic Capacity and the VO 2 Max.

The most damaging evidence from the perspective of the complainants and the Commission relates to what might be referred to as the physiological demands of firefighting and the apparent agreement of expert witnesses led both by the complainants and

the Commission on the one hand, and the respondents on the other. Experts on both sides share a common view as to how one can define the physiological demands made by firefighting and how to measure the capacity of an individual to meet these demands. Experts on both sides agree that very few, if any, 60 year olds can in fact meet these demands.

The position taken by the complainants and the Commission, in the face of this evidence, was that mandatory retirement at age 60 is still unsatisfactory and that it fails to respond to the situation of particular individuals. It is their view that mandatory retirement ought to be replaced by testing for these physiological deficiencies, even though if such a testing scheme were implemented, it would necessarily result in a much reduced age of retirement for all but a very few firefighters. Again, experts on both sides agreed that age 60 is too old for almost all individuals to be engaged in firefighting and therefore recommended a much earlier retirement. As was noted during these proceedings, there is a certain element of irony in the fact that this position is taken in the context of a group of complaints brought by 60 year old firefighters who wish to prolong their careers. Nonetheless, this is unquestionably the implication of the position advanced on behalf of these complainants and the Commission.

The principal expert witnesses on either side who touched upon these issues were, for the respondents, Dr. Alexander Lind and, for the complainants and the Commission, Dr. Paul Davis. Both men are distinguished physiologists, although Dr. Lind is evidently the more senior of the two. Dr. Lind comes to physiology as a scientist, with particular expertise in occupational physiology. Dr. Davis approaches the subject from a background of physical education and might best be described as an exercise physiologist.

Dr. Lind testified with respect to the general effect of aging on physiological capacity. As one would expect, his evidence indicated that physiological functions generally deteriorate with age. A number of indicators relating to the cardiovascular system appear to begin to decline at age 20. Muscle strength, however, remains reasonably constant from age 20 to 40 but then begins to decline and typically suffers a 20% loss by age 60.

For present purposes, the most important indicator of physiological strength is the individual's aerobic capacity and this has, in turn, become an important measure of the physiological demands of particular physical activity and occupations. That is to say, physiologists have been able to estimate the amount of aerobic capacity necessary to undertake particular tasks. Dr. Davis, in particular, has studied the

physiological demands of firefighting in these terms and has himself participated in the setting of a standard which appears to enjoy broad acceptance among the witnesses who testified during these proceedings.

In simple terms, aerobic capacity is the ability of an individual to absorb oxygen into the bodily system. As Dr. Lind explained, the muscles have two main sources of energy, anaerobic and aerobic. Anaerobic energy is that which is produced without the use of oxygen. It is produced by the breakdown of glycogen stored within the muscles and it is this energy source which explains the fact that one can expend energy for short periods of time without drawing on oxygen supplies. Aerobic energy, on the other hand, is produced by supplying oxygen and foodstuffs to the muscles, the foodstuffs being oxidized so as to produce energy.

The supply of anaerobic energy is very limited and is soon exhausted at high levels of energy expenditure. Thus, for most of our daily activities and for prolonged intense physical activity, the principal source of energy is aerobic.

The ability of an individual to sustain certain levels of energy output can be directly related to the individual's maximum capacity for absorbtion of oxygen or "maximal oxygen uptake". It is important to note that one does not operate at this maximal capacity in normal circumstances. As one becomes involved in

increasingly intense physical activity, however, the "oxygen uptake" of the individual increases. This increase cannot continue indefinitely and at a point near the point of exhaustion, one will have reached one's maximal oxygen uptake. This capacity,normally measured in litres of oxygen per minute,is usually referred to as the V0 2 Max. of the individual.

Again, this maximal uptake measurement is an indicator of the ability of an individual to sustain certain kinds of physical activity. Dr. Lind estimated, however, for example, that at a normal walking speed, the average individual would have an energy expenditure of just in excess of 1 litre of oxygen per minute. It was Dr. Lind's evidence that the basic tasks of "hands on" firefighting required an individual to have a capacity of 3 litres per minute. This estimate was based not simply on his own observations of firefighting but rather on his assessment of other studies attempting to measure the energy expenditure required in firefighting.

Dr. Davis, the expert led by the Complainants and the Commission, offered a very similar view of the physiological requirements of firefighting. Dr. Davis had himself been involved in studies that identified a level of aerobic capacity that would be necessary for fire-fighting, especially for the first fifteen to twenty minutes of "externally paced" activity at the fire scene. During the first fifteen or twenty minutes, of

course, the work is not only strenuous but is unbroken in the sense that there is normally no opportunity for relaxation. Dr. Davis and his colleagues have utilised a different measure of the individual's aerobic capacity in terms of "METS". The "MET" is the energy expenditure expended in a sitting, non-active position. Dr. Davis and his colleagues have established twelve METS as the basic physiological requirement for an individual to participate in fire-fighting. Indeed, it is their view that a margin of safety is appropriate and accordingly that 14 METS is a better standard.

It is possible to translate the METS standard into litres per minute. When one does so, as Dr. Lind did in his evidence, it is apparent that the standards set by Dr. Davis and his colleagues is very similar to the three litres per minute standard set by Dr. Lind. Indeed, if one accepts the 14 MET standard, the litre range for individuals weighing from 70 to 80 kg. would be approximately 2.94 litres per minute to 3.9. That is to say, the Davis standard would be somewhat higher for most people in the average weight range. Many individuals, of course, would be heavier than this.

It should also be added that the Davis study rests essentially on simulated fire-fighting undertaken by individuals whose energy expenditure was measured. Simulated fire-fighting, although it can of course approximate actual fire-fighting, will

no doubt lack some of the stress and perhaps other circumstances that may accommodate actual fire-fighting. It would not be unreasonable, therefore, to view these standards as conservative in nature.

The important point for present purposes, of course, is that a standard for the aerobic capacity required for fire-fighting has been set which appears to enjoy the support of experts on all sides of the present dispute. These experts are also in agreement on the fact that very few, if any, sixty year olds possess aerobic capacity at this level. Dr. Lind summarised the general understanding of his professional community on this subject in a chart (Exhibit 88) which shows aerobic capacity for the ordinary population at a high at age 20 and declining at about 8 to 10% per decade. The chart indicates that by age 60 at least 97% of the population is below the 3 litres standard. Dr. Lind suggested that "you would be lucky" if one fire-fighter in a hundred possessed the requisite aerobic capacity at age sixty. The point was put graphically in the following exchange: (Transcript, Vol. VIII, p. 163)

> Q. If we were to take a sixty year old fire-fighter, and put him on the back of a truck, and drive him through cold weather to a fire, and ask him to climb five flights of stairs, in full turnout gear, and a Scott pack, also carrying some other things, and perform a rescue, what percent of 60 year olds, in your view, would be able to do that?
>
> A. None.

In his evidence, Dr. Davis agreed that it would be a very unusual person who would be able to meet the 12 to 14 MET standard at age 60 and beyond.

Although there was a suggestion in the evidence that training and exercise programmes might ameliorate this situation to some extent, this does not appear to be a serious possibility. Dr. Lind testified, and this was not effectively undermined by any other witness, that trained individuals lose their aerobic capacity at approximately the same rate as untrained individuals. Moreover, although the upward movement of one's aerobic capacity as a result of training will depend to some extent on how badly out of condition one was before starting the exercise programme, the average increase in aerobic capacity from training is approximately 10%. Assuming such a level of improvement, Dr. Lind estimated that there would not be more than a very few fire-fighters out of a hundred (one or two or, perhaps three or four, he estimated) who might meet the requisite standard. Moreover, he noted, the effect of training cannot only be gained rather quickly, it will also be lost very quickly as soon as the exercise programme is discontinued or reduced below the required level. Even if one could enforce a regimen of compulsory exercise, then, only a very small handful of sixty year old fire-fighters would thus be enabled to meet the recommended standard for aerobic capacity.

Rather surprisingly, then, there is general agreement in the evidence led by all of the parties to this proceeding that an appropriate fitness standard for fire-fighting can be established and that all or almost all sixty year old fire-fighters do not meet that standard. On this evidence alone, the Respondents have made rather good progress toward their objective of establishing that "all or substantially all" sixty year old fire-fighters do not have the necessary level of physical fitness to discharge their responsibilities properly.

The position taken by the Commission and Complainants in response is that, even if this may be true, the standard is one for which individuals can be tested and accordingly, individualised testing ought to replace a compulsory retirement age. Again, it must be noted that individualised testing would, as the experts agree, result in a much lower average retirement age than sixty. Nonetheless, the evidence relating to testing must obviously be considered.

Dr. Lind and others asserted that there are two problems with testing. First, it was suggested that accurate testing for VO2 Max. carries with it certain risks to the test subjects. The most accurate testing is achieved by leading the individual through increasingly intense physical exercise until the person is pushed beyond the point at which his oxygen uptake continues to increase. For obvious reasons, there are some risks

associated with bringing sixty-year-olds up to this peak of physical activity and the Respondents' experts were opposed to doing so. The reply from the Commission's expert was to suggest that a so-called "sub-maximal" testing would be adequate. By this is meant the use of a test which measures oxygen intake at lower levels of activity and then projects what they would be for the test subject at higher levels of activity. Dr. Lind, however, was not at all convinced with the practicality of these tests. It was his view, which I accept, that the only accurate testing is at maximal levels. The sub-maximal tests were, he said, reasonably good at predicting the characteristics of groups of individuals but rather poor in predicting the VO2 Max. of a particular individual. He estimated their error rate at something in the order of 10 or 15%.

The other problem with testing is that individuals can train for the test and, unless they continue their exercise programme, create a misleading impression of their level of physical fitness. I accept this as being a genuine problem and indeed, some of the evidence relating to the attempts of particular Chiefs to introduce physical fitness programmes in the firehalls would suggest that it would be very difficult, if not impossible, to impose an exercise regimen of any kind.

In short, then, I am not satisfied that there is a practical alternative of individualised testing that would accurately

identify that apparently tiny group of sixty-year-old firemen who are capable of effectively discharging their responsibilities.

(ii) Increased Risk of Coronory Artery Disease

Considerable evidence was also led with respect to the phenomenon of the increasing risk of coronory artery disease that evidently accompanies the aging progress. Three distinguished cardiologists testified. The Respondents led evidence from Doctors Antlitz and Mymin. The Commission and Complainants led evidence from Dr. Leon. It is sufficient to note that each appeared to be very well-qualified for the task of providing expert testimony on this subject.

Although, as was the case with the evidence concerning aerobic capacity, there is general agreement amongst the experts on the nature of the underlying medical or physiological facts, the experts disagree on the suitability of a compulsory retirement age as a device for constraining the risk of what might be referred to as cardiac events in older fire-fighters. Again, it is the position of the Complainants and the Commission that a testing procedure could be adopted that would more satisfactorily identify individuals at risk. In the present context, however, the testing procedure would ultimately lead to highly invasive and somewhat risky surgery. Before turning to the question of the suitability of this alternative, however, a

brief account of the general nature of coronary artery disease (CAD) is necessary.

The definition offered of CAD by Dr. Mymin is a "narrowing of a coronory artery". The coronory arteries supply blood to the heart. The heart muscle itself has no supply of anaerobic energy and is therefore dependent on aerobic energy and the blood supply. A variety of cardiac or heart events may be produced by a restriction in the supply of blood to the heart. Some of these would be referred to as "heart attacks" (or, more technically, "myocardial infractions") and may lead to death. Dr. Mymin further indicated that there would be some who would define CAD as occurring only once an event had occurred. Nonetheless, he stressed, the disease actually begins many years before with the gradual narrowing of the arteries.

There is considerable difficulty in predicting with accuracy what degree of narrowing of the arteries creates a substantial risk of disease. It was Dr. Antlitz' view, however, that a 50% occlusion creates a risky situation. Dr. Leon was not in complete agreement with this and appeared to be of the view that 60% is a better figure. Although it is evident that reasonable experts can disagree with respect to what amounts to "substantial risk", it is nonetheless apparent that once the narrowing becomes 50% or so, a significant degree of risk is present. Dr. Antlitz further testified that in the age range from 55 to 60, more than

50% of the general population will have a 50% occlusion of one or more coronory arteries. Indeed, a 1950 study (illustrated in Exhibit 95) indicated that at age 50, over 70% of the population has 50% or more. The figure declines after age 55 as individuals who die (at least some, of course, from heart disease) thin out the population. Although there has been a reduction of heart disease since 1950, Dr. Antlitz relied on more recent studies for the view that in the age range from 55 to 64, almost 60% of the general population has 50% occlusion. These figures are based on autopsy studies as it is apparently the case that it is impossible to find out the degree of occlusion in an individual's arteries without actually examining them.

It was Dr. Antlitz' view that this already substantial risk of cardiac events is intensified by the working conditions of fire-fighters. Thus, while a narrowed artery may not be so great a problem for someone whose employment is essentially sedentary in nature, the substantial risk of a cardiac event is increased when one engages in strenuous physical work, especially under conditions of emotional stress and under conditions of extreme heat and cold. It was Dr. Antlitz' view that the reasoning that leads to the advice that the more elderly ought not to engage in such tasks as shovelling snow and pushing cars out of snowdrifts also supports the advice that people over the age of sixty ought not to engage in fire-fighting. Moreover, Dr. Antlitz noted that one can take a rest when shovelling snow and that this will often

not be the case in the course of fighting a fire. Dr. Antlitz' confident opinion is that it would indeed be preferable to reduce the retirement age for fire-fighters significantly below the age of sixty.

The evidence of Dr. Mymin and Dr. Leon was, in its characterisation of the nature of the disease and the nature of the incidence of occlusion, essentially similar to that of Dr. Antlitz. The disagreement amongst the experts relates to the suitability of age as a predictor of cardiac disease as opposed to other kinds of predictors. On this subject as well, however, there was much in common in the evidence of the expert witnesses. The essential differences are questions of emphasis and what appears to be a different judgment as to the desirability of intrusive diagnostic techniques.

Although I am satisfied on the evidence that there is, in some sense, substantial risk of CAD for individuals approaching and passing the age of sixty, and that this risk is increased by the rigours of fire-fighting work, it is nonetheless of interest that there appears to be no completely persuasive demonstration of a statistical correlation between fire-fighting and a higher incidence of cardiac events. Although some studies, such as those of Dr. Barnard (see Exhibit 116 and work of his referred to in Exhibit 152) suggests that fire-fighters do suffer a higher degree of heart disease and that it is job-associated, another

study led in evidence (Exhibit 152 - the "Dibbs Study") suggests the contrary. Two explanations were offered for the contrary view suggested by the Dibbs Study. First, some deficiencies for present purposes in the Dibbs Study were suggested. The sample group was small. The sample appeared to include very few fire-fighters over the age of 55 and there is no indication that people over the age of 60 were included. This may result from the fact that there has been a widespread reduction in the retirement ages of fire-fighters in the United States, the country in which the Dibbs Study was undertaken. Further, there is no clear indication in the Dibbs Study that the older fire-fighters, however many there were in the sample, were engaged in "hands on" firefighting. Finally, it was suggested that even if it were true that a higher incidence cannot be shown statistically, that fact might well be explained by a reluctance of older fire-fighters to fully exert themselves or, alternatively, a willingness of younger fire-fighters to try to ensure that they are not forced to undertake heavier tasks, when possible. Certainly, there was some impressionistic evidence to this general effect led in these proceedings.

If the statistical evidence does not speak with one voice, then, it is nonetheless apparent that fire-fighters are, at age sixty, enduring a significant risk of CAD and I am also satisfied, principally by the evidence of Dr. Antlitz, that that risk is increased by the nature of fire-fighting to a degree

which has not yet been statistically demonstrated with absolute certainty or precision.

The evidence was also less than completely compelling on the question of whether CAD is a significant source of employee failure. No evidence was led with respect to the incidence of cardiac events creating dangerous situations on the job. Further, although there was some impressionistic evidence to the general effect that individuals who appreciated that they have a problem may not be fully engaged in the more vigorous aspects of fire-fighting, it was not possible to gain a clear impression from the evidence as to how widespread a problem employee apprehension of cardiac events is in leading to unsatisfactory employee performance. The question arises, then, whether the employer has established that it is a reasonable requirement to insist that employees not have a significant risk of cardiac events. On this branch of the enquiry, the question becomes essentially one of determining to what extent the employer is entitled to err on the side of caution in devising its job requirements in an effort to reduce the risk to public safety inherent in unsatisfactory performance. It will be recalled that the U.S. Supreme Court suggested in Criswell that in a clear case of public safety, "it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' in the safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably

necessary' to err on the side of caution in a close case" (at p. 2754).

The absence of overwhelmingly persuasive evidence on the extent to which cardiac events or the apprehension of them leads to unsatisfactory performance, appears to me to make this a "close case". Nonetheless, it is obvious that the consequences of employee failure can be very grave not only for fellow workers but for members of the public. Accordingly, it is my view that the question of whether it is reasonable for fire departments to insist that fire-fighters not be in the position of having a substantial risk of a cardiac event must be answered in the affirmative. Dr. Antlitz drew a comparison with the undesirability of older men engaging in vigorous snow shovelling. By way of testing out the proposition, one might ask whether, if snow shovelling were a life and death matter, often undertaken on short notice in the middle of the night while wearing heavy equipment, would it be reasonable for employers to insist that the individuals doing the job were not, by so doing, running a significant risk of a cardiac event. Such a requirement would be, in my view, and would be seen by the public, as a reasonable one in the circumstances.

Assuming, then, that the absence of substantial risk of a cardiac event is a reasonable requirement, the question becomes one of determining whether or not some device other than

compulsory retirement would be a preferable means of identifying employees at risk. Certainly, the evidence led in these proceedings would not suggest that "all or substantially all" employees are at such risk. Accordingly, the question becomes one of determining whether or not it is possible or practical to provide individualised testing of employees to determine whether or not they have a significant CAD problem or potential. It was indeed this question that was the preoccupation of most of the evidence led relating to CAD.

The position taken by the Complainants and the Commission is that age is not a very good indicator of the presence of substantial risk and that much better indicators can be found in what is referred to as "risk factor analysis". Although there is apparently some variation in professional opinion as to how risk factor analysis ought to be conducted, the general approach is one of identifying factors such as elevated blood pressure, cigarette smoking, family history of CAD, and so on, that are thought to be linked statistically, if not causally, with the incidence of this disease, in order to determine the chances that the individual in question will suffer from the disease and have a cardiac event at some point.

The Respondents reply that of all the risk factors, age is the best indicator and accordingly, their practice of simply having a mandatory retirement age is soundly based on age as a

predictive device. The short answer to this dispute between the parties is that neither age alone nor a risk factor analysis is a very accurate way of assessing such risk. Either device suffers from identifying within the "risky" group, large numbers of people who are not substantially diseased(the problem of "false positives). Many who are at risk will not be identified (the problem of "false negatives). Whatever the deficiencies are of age as a predictor, then, predictability is at best marginally enhanced by risk factor analysis.

The so-called "Framingham" study (Exhibit 174) presents a risk factor analysis which appears to be the most widely-used in the profession. The analysis is set forth in a handbook prepared under the auspices of the American Heart Association which contains a set of probability tables employing seven specified characteristics or risk factors that can be measured reasonably easily in clinical settings. The seven factors are sex, age, cigarette smoking, blood pressure, cholesterol levels, glucose tolerance and abnormalities revealed by electrocardiogram testing (ECG). Separate tables are set out for men and women at five-year intervals beginning at age 35 and ending at age 65. As counsel for the Respondents pointed out in argument, however, despite the apparent sophistication of this technique, it is nonetheless the case that if one takes the highest risk group at age 60 or 65, it will nonetheless be true that the vast majority of people within that group will not have a cardiac event in the

near future and the vast majority of people who do have such events will be found in other categories.

This is not to say, of course, that risk factor analysis is not a useful and important diagnostic technique. Indeed, it is obviously thought to be of considerable significance in prescribing avoidance techniques such as attempting to control risk factors (e.g., quitting smoking, reducing cholesterol levels, maintaining fitness). Risk factor analysis is not, however, a very accurate method of predicting whether an individual who has no previous history of heart disease (referred to as an "asymptomatic" individual) will, in fact, suffer from the disease in a substantial way or incur a cardiac event.

Moreover, the Framingham tables themselves amply demonstrate that as the individual ages, the usefulness of other risk factors as instruments of prediction declines. Thus, when one reaches the age of sixty, for example, almost every individual will have a 5% risk (Exhibit 174, p. 19) and yet, 5% is thought to be a significant indicator of risk for at least some diagnostic purposes.

In short, then, I am persuaded that risk factor analysis does not provide a satisfactory device for identifying with sufficient precision individuals who are likely to suffer from

CAD to such an extent that their continued performance presents a serious safety risk. Indeed, this point is virtually conceded by the Complainants and the Commission by virtue of the fact that they have advocated the use of more searching screening tests in order to identify with greater precision candidates for cardiac events. In this, they have followed what came to be referred to in these proceedings as the "U.S. Army model" which was described by Dr. Leon in his evidence and briefly documented in one of the Exhibits (Exhibit 169). What is envisaged in the U.S. Army plan is a step by step diagnostic investigation of active duty personnel which begins with the Framingham analysis and, if the employee in question fails the test at each of the successive levels, ends with an angiogram and possibly by-pass surgery. The angiogram or catheterisation procedure, as is widely known, involves a surgical procedure of exploratory investigation within the arteries themselves. The by-pass operation involves the removal of the diseased portion of the arteries and replacement with artificial material.

At the risk of over-simplification, the programme proceeds generally along the following lines. All employees are required to undergo the Framingham analysis. If they have a 5% or greater risk factor analysis, they are required to move to the second step which is an electrocardiogram test undertaken while the test subject is put through an exercise regimen. It should be added that the so-called "exercise ECG" is also a procedure which

involves many false positives and false negatives. Nonetheless, it is thought to be a helpful escalation of the investigation. Depending on the outcome of the exercise ECG, the individual may be put on a programme of risk factor control or, if significant problems are signalled by the test, the individual will be required to undertake an angiogram and, again, possibly by-pass surgery.

The angiogram, obviously, is a very much improved method of detecting the presence of CAD. Indeed, it would appear to be the only truly accurate method of determining the presence of the disease. It is also, of course, a very extreme solution in the problem of trying to identify the presence of the disease inasmuch as it is an invasive and somewhat dangerous surgical technique. As many as 3 of 100 persons who are subjected to angiograms suffer complications. It was variously estimated in these proceedings that one in 500 or one in 1000 angiogram subjects do not survive the procedure. One need hardly add that it is a very expensive procedure to mount and, in Dr. Antlitz' view at least, the use of an angiogram as a screening device for employment purposes would be a highly questionable, perhaps unethical, use of scarce public resources. Certainly the suggestion that mandatory retirement be replaced by diagnostic techniques leading up to and including somewhat dangerous surgery, raises rather interesting questions.

Counsel for the Respondents has argued that it is simply beyond the capacity of the Board of Inquiry appointed under the Ontario Human Rights Code to make orders of this kind. I am not convinced, however, that it is beyond the capacity of a Board to make an order which might require some testing of individual employees as a substitute for mandatory retirement. Indeed, this seems to be inherent in the second branch of the Tamiami test which indicates that if it is not the case that "all or substantially all" of the employees lack the requirement at issue, the employer must demonstrate that it is either impossible or impractical to deal with employees on an individualised basis, that is to say, assess them individually with a view to determining whether they meet the requirement in question. In the present context, then, the question must be whether it is a practical suggestion to either rely on compulsory angiograms which would be an accurate means of identifying the employees with a high risk of cardiac events or, alternatively, rely on some less dramatic means such as risk factor analysis and exercise ECG's as a means of diagnosis.

With respect to the compulsory angiograms, I will simply note that this does not seem to me to be a practical suggestion. Assuming that the medical profession would agree to undertake such surgery as a screening device, a programme that conditioned continuing employment on this technique would be very expensive and poses a significant risk to the personal health and safety of

the employee subjected to the operation. For these reasons, and the reasons suggested by Dr. Mymin, this suggestion does not offer a practical alternative to compulsory retirement.

As far as risk factor analysis and exercise electrocardiograms are concerned, I have indicated above that the evidence in the proceedings suggests that these diagnostic techniques are very unreliable. They do, of course, appear to be the best methods available at the present time and accordingly, are quite properly utilised by the medical profession to identify situations in which preventive medicine or further investigation is desirable. These methods were not designed as screening devices for employment purposes, however, and it seems to me that at their present level of accuracy they are ill suited to this purpose.

Accordingly, I conclude that the employers have demonstrated that it is "impractical" to deal with employees on an individualised basis to determine whether a particular employee suffers from CAD to such an extent that there is a substantial risk of a cardiac event occurring.

Although the evidence does suggest that the statistical chances of a cardiac event actually occurring on the job are slim, it would appear to be consistent with the American jurisprudence to permit employers to err on the side of caution

in cases such as the present where the consequences of employee failure have grave implications for public safety and the safety of fellow employees.

(iii) The Decline of Cognitive Functions

The Respondents also led evidence in support of the proposition that the deterioration of cognitive processes that accompanies the aging process has a significant impact on the capacity of individuals to engage in fire-fighting and that compulsory retirement at age 60 can be supported on this basis as well. This evidence was provided by a psychologist, Dr. William Hoyer, whose principal area of expertise relates to the impact of aging on cognitive processes. He has published a great deal of research on this subject.

Dr. Hoyer identified three different types of mental capacities, "sensation", "perception" or "attention" and "cognition". It was Dr. Hoyer's evidence that each of these different categories of mental capacity were relevant to fire-fighting, that there is a general decline in these cognitive functions which usually becomes noticeable in the early to mid-fifties, and that this decline (unlike the decline of aerobic capacity discussed above) is not linear in nature but proceeds at an accelerating pace through the later fifties and into the sixties.

With respect to "sensation", for example, there is a decline of visual acuity, a decline of "light/dark adaptation" and of peripheral vision. Although the first is correctible, the second, i.e. the ability of the eye to adjust when one moves from darkness to light and vice versa, and the third, the ability to detect objects off to the side, are not correctible.

With respect to "perception" or "attention", Dr. Hoyer placed some emphasis on what he referred to as the capacity for information processing and more particularly, the ability to filter out irrelevant information. Apparently, one's ability to cope with situations of "divided attention" in which the individual is confronted with a variety of sources of information deteriorates with age. One becomes more distractible or less capable of focusing on the important information source. This function can be improved with practice, according to Dr. Hoyer, but only with respect to very "task specific" contexts, so that this deterioration makes a significant problem for one who, like a firefighter, is confronted with a quite variable work environment.

Dr. Hoyer identified three sub-groups of the third capacity, "cognition". These he described as "learning memory", "reaction time" and "problem-solving". The first has to do with the declining capacity of the individual to learn and provides

scientific footing for the old saw that "you can't teach old dogs new tricks".

The significance of a decline in "reaction time" is obvious. Dr. Hoyer testified that in the context of "externally paced" jobs, it is often observed that older workers are unable to keep up with the pace of the job and attempt to move to other jobs where there is a greater opportunity to move at a slower pace. It was argued that in the context of "hands on" fire-fighting, reaction times can be quite important.

As far as "problem-solving" is concerned, one's capacity to reach conclusions or make decisions quickly deteriorates and accordingly, when operating under severe time constraints, the likelihood of mistakes is increased. The effect of Dr. Hoyer's evidence was to suggest that a task such as "size-up" at the fire scene might take an individual in his sixties twice as long. This deterioration is accentuated, according to Dr. Hoyer, in environments in which the individual is likely to suffer from irrelevant stimuli, fatigue or stress and anxiety. Needless to say, it was urged upon me that fire-fighting is a context in which these factors are present.

In short, Dr. Hoyer's evidence provided a basis for the view that there is a decline in certain relevant mental capacities accompanying age which intensifies as the average individual

approaches the age of sixty. Although Dr. Hoyer's evidence was not contradicted in the sense that no expert evidence was led by the Commission and the Complainants that questioned his opinions or offered a contrary view, two responses to his evidence were suggested by counsel. In cross-examination, Dr. Hoyer was challenged with the proposition that "experience" might be an offsetting advantage of the older worker which would compensate for this deterioration. Dr. Hoyer disagreed with this and suggested that there are two different categories of intelligence "crystallised" and "fluid" intelligence, only one of which improves with experience. "Crystallised" intelligence is characterised by rote learning, repetition and predictability, and this is said to be improved with experience. "Fluid" intelligence is essentially the ability to apply knowledge to normal situations and this is said to deteriorate significantly as one approaches age sixty. As one might expect, it was argued that fluid intelligence is of particular importance in the fire-fighting context.

Secondly, it was urged on behalf of the Commission and the Complainants that the decline in these various mental functions was measurable and accordingly, it should be possible to devise some kind of test battery to weed out employees who have become incompetent as a result of this type of deterioration. The short answer to this suggestion, apparently, is that while these capacities can be measured, some of them only in the laboratory

setting, there does not appear to be any currently-available testing battery that would link measurable levels of these capacities to particular job requirements.

The substance of this evidence is to suggest, then, that quite apart from a relevant decline in physical fitness, a deterioration in what might be referred to as mental fitness that accompanies the aging process may be relevant to the capacity of the individual to discharge fire-fighting responsibilities. Counsel for the Respondents argued that as this evidence is uncontradicted, and as it is apparently not possible to measure in any practical way the extent of decline, this evidence also supports the employer's bfoq defence. Moreover, it was noted that although this evidence is perhaps less precise than the evidence relating to aerobic capacity or coronary artery disease, it is nonetheless relevant and, indeed, the very sort of evidence that appears to have been persuasive in the cases dealing with maximum hiring ages in the context of bus driving, for example. In Tamiami, it will be recalled, it was argued that older workers, beyond the age of fifty or so, are less able to deal with the psychological rigours of the "spare board" system. This kind of evidence, it was argued, should be similarly persuasive in the present context.

My own view is that this evidence is less persuasive than that relating to aerobic capacity and CAD and, indeed, I am not

confident that this evidence alone would be sufficient to establish a basis for mandatory retirement at age sixty as a bfoq. This evidence would have been more persuasive, in my view, if it had been more clearly linked to impressionistic evidence of employee failure on the job. It would have been of considerable interest, for example, to know whether it is in fact the case that older fire-fighters make mistakes in "size-up" that younger workers would not make. It would be of interest to know of situations in which reaction time problems have led to accidents or failed opportunities to fight particular fires effectively, and so on. In short, while there is certainly a plausibility to this evidence, and a potential relevancy, I am relieved to be spared the burden of determining whether on this evidence alone the bfoq could be successfully established.

(iv) Conclusions

It follows from the foregoing discussion that the Respondents have, in my view, successfully established an evidentiary basis for mandatory retirement at age sixty as a bona fide occupational qualification. The evidence with respect to aerobic capacity is particularly compelling. Once again, all parties to this dispute agree that there is a set of tasks that all fire-fighters must be able to perform and that their performance requires a definable level of aerobic capacity. It is also common ground to all parties that very few, if any, fire-

fighters at age sixty will possess this capacity. On this basis alone, the Respondent employers have, in the language of the Tamiami test, established that all or substantially all employees at the mandatory retirement age are not capable of discharging their responsibilities properly.

An alternative, if less persuasive basis, has been established in the evidence with respect to coronary artery disease. The presence of this disease in individuals in their mid-fifties and beyond and the consequent risk of on-the-job cardiac events has been established in the evidence, together with the impracticality of testing for the presence of this disease with an acceptable level of accuracy. The evidence relating to the decline in cognitive functions, though plausible and potentially relevant, seems somewhat less compelling.

VII. THE IRONY OF THE COMMISSION'S POSITION

These complaints were brought, of course, by fire-fighters subject to mandatory retirement at age sixty who believe that they are being unfairly discriminated against on the basis of their age. It is their view that they are equal to the task of fire-fighting and should be allowed to continue until such time as their ability to do the job deteriorates. As has been explained above, it is the evidence both of the Respondents' witnesses and of the witnesses led by the Commission that very

few, if any, fire-fighters at age sixty are capable of doing the job properly. The view taken by the Commission, nonetheless, is that mandatory retirement at age sixty should be abandoned and replaced by a battery of tests that would, in fact, have the effect of retiring most fire-fighters at ages significantly lower than age sixty. Thus, the Commission agrees that a particular level of aerobic capacity is a reasonable measure of the level of physical fitness required to properly engage in fire-fighting and agrees, as well, that it would be a very rare individual who would possess this capacity at age sixty. Indeed, Dr. Davis, the Commission's leading witness on this point, is very much in favour of significantly-reduced retirement ages for fire-fighters and advocates a vigorous programme of physical fitness and fitness testing which, again, would have the effect of retiring many fire-fighters in their early to mid-fifties.

It appears to be the Commission's view that even though "all or substantially all" fire-fighters at age sixty are unlikely to be able to carry out their responsibilities properly, it is nonetheless open to the Complainants and the Commission to argue that compulsory retirement at age sixty should be struck down under the Code and replaced by a scheme which would normally involve earlier retirement on the ground that age sixty is an arbitrary point at which to terminate a fire-fighter's career. Indeed, it was suggested on behalf of the Commission and the Complainants that it would be in the public interest to adopt the

sort of scheme promoted by Dr. Davis inasmuch as it would improve the level of fitness in fire-fighters employed by the Respondents.

There is evidently some irony in the fact that the position taken by the Complainants and the Commission is that mandatory retirement should be replaced by a testing battery which the Complainants themselves are almost bound inescapably to fail and which most of their colleagues would fail at ages significantly below the age sixty.

Quite apart from the irony of this position, however, it may be asked whether it is a position that is open to the Complainants or the Commission once the Respondent employer has successfully established that "all or substantially all" of its employees will not meet the job requirements at the mandatory retirement age it is defending. In other words, once the Respondent establishes the "all or substantially all" branch of his bfoq, is it still open to the Commission to argue that the mandatory retirement age is nonetheless arbitrary and ought to be replaced by a scheme which, by definition, can only have the effect of retiring employees with very few exceptions, at much earlier ages?

Strictly speaking, it is not necessary for me to resolve this point inasmuch as I have found that there is no practical

means of accurately testing aerobic capacity for these purposes. Nonetheless, it is my view that there is a persuasive argument that it is not open to the Commission to advance a position of this kind once the Respondent has successfully established that "all or substantially all" of its employees are incapable of proper discharge of their responsibilities at the mandatory retirement age at issue. Once that has been established, it seems to me that the bfoq defence is then erected and the Complainants have no basis for alleging that they are being discriminated against. Nor is it open to them, I would suggest, to argue that in any event the mandatory retirement age ought to be struck down on grounds of arbitrariness with the result that employees will be retired, in a typical case, at much earlier ages.

To put the matter differently, even if the Commission is correct in asserting that it would be in the public interest to retire firefighters, on grounds of lack of physical fitness, at ages less than sixty, it seems to me that the Respondent's failure to do this does not amount to discrimination against people in the position of the Complainants, i.e., people over the age of sixty. Thus, even if there were a convenient and practical means for identifying unfit fire-fighters, it does not seem to me to be open to the Complainants and the Commission to impose a testing scheme of this kind on the Respondents on the basis that failure to do so constitutes discrimination against people over

the age of sixty, i.e., people who, according to the evidence on all sides of this dispute, are almost invariably going to fail this test.

To explain this point in terms of the language of the Tamiami test, it would appear that the Commission is attempting to argue that the Respondent employers must meet both branches of the test. That is, it is being suggested that the employers must establish both that "all or substantially all" of sixty-year-old employees are not sufficiently competent and, as well, that there is no practical means for measuring the level of competence in issue. My own view is that the two branches of the test are independent in the sense that once the employer succeeds on the "all or substantially all" branch of the test, it is not open to the Commission and the Complainants to argue that the employers must meet the other branch of the test as well, and that if they fail to do so (that is, if there is a convenient test available) the employer must adopt this testing device with the effect that most workers, with very few exceptions, will be retired at ages significantly earlier than the mandatory retirement age. In my view, then, it is not enough for the Commission to establish that the mandatory retirement age is in some sense arbitrary, it must show that the arbitrariness discriminates against people in the position of the Complainants.

It may well be, as counsel for the Complainants and the Commission has argued, that there is a public interest to be served by significantly earlier retirement of unfit fire-fighters. Nonetheless, on the evidence led in this case, the argument in favour of such a scheme cannot be that failure to introduce such a scheme will unfairly discriminate against fire-fighters at age sixty and beyond. Again, the evidence establishes that under such a scheme they would almost inevitably be retired at age sixty or before in any event.

VIII. THE COMPLAINTS AGAINST THE RESPONDENT UNIONS

The successful establishment of the bfoq defence by the respondent employer carries with it not only the dismissal of the complaints against the employers but the complaints against the respondent unions as well. With respect to the unions, however, it is necessary to address certain questions of fact and further difficulties standing in the way of the complaints against them.

It will be recalled that the complaints against the unions are essentially of two kinds. First, it was alleged by three of the Complainants, Hope, Karr and Callen, that the involvement of

the respondent unions in negotiating or failing to negotiate the removal of mandatory retirement from their respective collective agreements constituted a breach of the Code. Secondly, two of the Complainants, Hope and Callen, complained with respect to particular conduct of union officials. In Hope's case, the complaint related to the union's failure to process a grievance on his behalf relating to his compulsory retirement. In Callen's case, the allegation was that the union had engaged in unlawful harassment of him by posting in all of the Windsor fire stations photocopies of his letter protesting his compulsory retirement and indicating his belief that this constituted a breach of the Ontario Human Rights Code.

With respect to the first category of complaint, much argument was directed to the question of whether trade unions could breach the Code by conduct of this kind. As well, it was argued that in the case of St. Catharines, at least, there was no evidence to indicate that the scheme had been freely bargained for by the union rather than simply imposed by the municipality through a by-law relating to pensions. A further objection in the case of St. Catharines was that the original implementation of the scheme pre-dated the pertinent provisions of the Ontario Human Rights Code and that accordingly, the discussions that may have led to the original enactment of the by-law in 1946 could not attract liability under the Code. Finally, it was argued that whatever liability might be attracted by the original

negotiation of such schemes, the fact that a particular union had simply failed to negotiate a removal of the scheme in any particular year would not provide a foundation for a breach of the Code.

Given the nature of my findings in this case, it is unnecessary to explore these issues at length. I am satisfied, however, that some of these objections to the complaints against the unions are not of consequence. Speaking hypothetically, it would appear to me that if a union did in fact negotiate a provision which discriminated, on a ground prohibited under the Code, against a particular class of employees, a member of that class may well be able to complain that the union is discriminating against such individuals because of a failure to represent them equally with other trade union members in negotiations with management. In a particular case, it seems to me that it would also be conceivable that a union that refused to communicate a concern of this kind to management in the course of negotiations might similarly run afoul of the provisions of the Code. On the other hand, it is also my view that much more would need to be known about the discussions involving trade union officials and management officials as well as affected members of the union, than has been presented in this case, in order to ground a finding of this kind.

I will not explore here, as I have not heard sufficient argument on this point, the question of whether the mere existence of such provision shifts a burden of persuasion of any kind to a respondent union. I am persuaded, however, that the provisions of the Code applicable to trade unions have the effect of precluding trade unions from discriminating, on prohibited grounds, against any member or group of members in the provision of services to the membership, including services of what might be referred to as a "representational" nature.

With respect to Mr. Hope's complaint concerning the union's refusal to process a grievance, I am satisfied that there is no basis for this complaint to succeed. The evidence indicates that the refusal to proceed with his grievance did not rest on a discriminatory bias against the Complainant but rather on the basis of a good faith judgment that there was no conceivable basis for the complaint under the collective agreement. It was the evidence of Mr. Jones, the President of the respondent union at the material time, that he believed that the arrangements relating to retirement were simply not covered by the collective agreement and therefore something that the union had no basis for grieving. As counsel for the respondent union argued, there is in fact a substantial legal basis for such a belief. In Bell Canada v. Office and Professional Employees' International Union, Local 131 (1973), 37 D.L.R. (3d) 561 (S.C.C.), the Supreme Court of Canada held that "retirement" under a mandatory retirement

scheme at the initiative of the employer did not constitute a "dismissal" and therefore was not arbitrable under the collective agreement in that case. Whether or not Mr. Jones was fully aware of the legal situation is not entirely clear from the evidence. Nonetheless, it is clear that his thinking in refusing to go forward with the grievance did not relate to a policy of some kind of the union to discriminate directly or indirectly against older members, but rather on the basis of a good faith belief that the union could not succeed in such a grievance. To act on this basis in determining not to go forward with a grievance does not, in my view, constitute a discriminatory provision of a "representational" service.

Finally, with respect to Mr. Callen's grievance against his union, I was persuaded by and accept the evidence of Mr. Turpin-Carroll that the posting of the letter in question was not in any way intended as an act of harassment that would amount to contravention of the Code. It was Mr. Turpin-Carroll's evidence that the union had a policy of posting documents in the various fire halls so that members who were not present at a particular meeting would be enabled to become aware of important issues being considered by the union. The issues raised by Mr. Callen were obviously of importance and the decision by the union to make the membership aware of them was, I believe, taken in good faith for these reasons and not in order to embarrass, humiliate, or harass Mr. Callen or to encourage others to engage in this sort of activity.

IX. CONCLUSION

It follows from the findings of fact and analysis set out in preceding sections of this decision that each of the complaints brought by the Complainants against each of the Respondents should be dismissed.

The principal basis for this dismissal is that the respondent employer has successfully established mandatory retirement at age sixty as a bona fide occupational qualification. The respondent employer successfully established (and indeed no serious challenge was made on this point), that each of the Complainants are obliged as a matter of routine duty to engage in "hands on" fire-fighting. Moreover, it was common ground amongst the experts led by all parties that a certain minimum level of physical fitness is a necessary requirement for fire-fighters to be able to properly discharge their responsibilities in this regard. Further, it was common ground to all parties that that level of fitness can be assessed by measuring the aerobic capacity of individuals. Moreover, the parties were in essential agreement as to what that level of aerobic capacity should be. It was further common ground amongst expert witnesses, led by all parties, that all or almost all individuals aged sixty would not possess an aerobic capacity at this level. The Respondents' expert testified that it is likely that no sixty-year-old fire-fighter would possess this capacity.

Statistically, it would be unusual to find as many as one in a hundred individuals at this capacity and, even with a serious programme of physical fitness, it would be only a very few individuals who could meet this standard. The expert evidence led by the Complainants and the Commission essentially agreed with this evidence and conceded that it would be a very unusual person who would be able to carry on fire-fighting beyond the age of sixty years. Indeed, virtually all of the expert witnesses were in agreement that for this and for other reasons relating to coronary artery disease and general deterioration of physical and mental capacities, retirement at an earlier age than sixty would be desirable in most cases.

The evidence also establishes, to my satisfaction, that there are no methods of testing either aerobic capacity or propensity for coronorary artery disease currently available which are sufficiently accurate and safe to be imposed on the respondents as a substitute for their compulsory retirement scheme.

The evidence relating to the difficulty of fire-fighting as an occupation was impressive. Dr. Lind, an occupational physiologist, described it as one of the most difficult occupations in our society. While this evidence leads us to be appreciative of the contribution made by fire-fighters to our collective well-being and is sensitive to the difficulty of their

tasks, it also leads easily to the conclusion that against this background, and in light of the medical and statistical evidence led by the Respondents, the case for compulsory retirement at age sixty has been solidly established by the Respondents in this case.

It is perhaps not surprising, then, that the evidence reveals that a reduced retirement age was actively sought by firefighters and their unions and agreed to by employers for reasons of the health and safety of firefighters and the general public and was believed by all concerned to constitute a significant improvement in the conditions of work for fire fighters.

For the foregoing reasons, these Complaints are hereby dismissed.

John D. McCamus

DATED AT TORONTO this 5th day of December, 1986.

#262

OSGOODE HALL LAW SCHOOL OF YORK UNIVERSITY
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January 13, 1987

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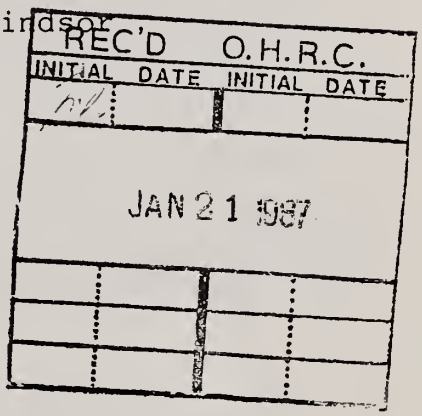

Hope et al v. City of St. Catharines et al

Ms. S. Liang of the Sack, Charney firm has drawn my attention to the fact that two lines have been dropped from the first paragraph on page 38 of the copy of the Award in this matter, previously circulated to you.

The eighth and ninth lines of that paragraph read as follows in the full draft:

> mandatory retirement age would not be able to meet the qualification in question

I enclose, with apologies for the inconvenience, a corrected version of the full page.

John D. McCamus

Enc:

3. In making the determination indicated in item 2, it is appropriate to first determine whether the qualification imposed by the employer is reasonably necessary in light of the public safety implications of the occupation in question and secondly, to determine whether all or substantially all of the employees at the mandatory retirement age would not be able to meet the qualification in question or, alternatively, whether the qualification is such that it is impossible or impractical to make individualised assessments of employees.

4. The adjudicator must consider evidence relating to the duties to be performed by the employee, the conditions existing in the workplace and the effect of such conditions upon employees at or near the retirement age sought to be supported. As well, evidence concerning the relationship between the aging process and the safe, efficient performance of the duties would be required and in this regard, 'statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, would certainly be more persuasive' than anecdotal evidence of individuals familiar with the workplace environment in question. (at p.23)

Finally, it may be noted that the underlying premise of the reasoning in Etobicoke is that it is at least conceivable that a bfoq defence can be established with respect to a mandatory retirement age and accordingly, the Code ought not to be interpreted in such a way as to preclude such a finding. Thus, it is not surprising that in a number of cases age requirements of various kinds have been upheld in the Canadian case law. See, for example, Re Manitoba Human Rights Commission et al and City of Winnipeg et al (1983), 144 D.L.R. (3d) 353 (Man. C.A.); Moose Jaw et al v. Saskatchewan Human Rights Commission et al, [1984] 4 W.W.R. 468 (Sask. Q.B.); Saskatchewan Human Rights Commission et al v. Saskatoon et al (1985), 37 Sask. R. 1 (Sask. Q.B.) Although these are cases that have upheld the mandatory retirement ages, it is not suggested, of course, that these